No. 00-8452

Supreme Court, U.S.
FILED
NOV 29 2001

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

JOINT APPENDIX
VOLUME III, PAGES 411 TO 635

RANDOLPH A. BEALES
Attorney General
of Virginia

PAMELA A. RUMPZ
Assistant Attorney General
Counsel of Record

Office of the
Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

Counsel for Respondent

ROBERT E. LEE
Counsel of Record

MARK E. OLIVE
Virginia Capital
Representation Resource
Center
2421 Ivy Road, Suite 301
Charlottesville, Virginia
22903
(434) 817-2970

CHARLES E. HADEN
2440 West Queen Street
Suite B
Hampton, Virginia 23666
(757) 825-0022

JAMES W. ELLIS
1117 Stanford Drive, NE
Albuquerque, New Mexico
87131
(505) 277-4830

Counsel for Petitioner

Petition For Certiorari Filed February 1, 2001
Certiorari Granted September 25, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

229 pp

TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries..... 1
Capital Murder Indictment, 11/19/96 2
Testimony of Phillip Atkins, 2/10/98..... 3
Testimony of Investigator Lyons, 2/10/98 5
Prosecutor Argument to Judge, 2/10/98..... 15
Photographs from ATM, 2/10/98..... L1*
Court Ruling, 2/11/98..... 17
Testimony of Officer Tutone, 2/11/98 18
Testimony of Dr. Ozita Cooper, M.D., 2/11/98 19
Testimony of Nurse Jacquelyn McIntyre, 2/11/98 23
Testimony of Dr. Leah Bush, M.D., 2/11/98..... 25
Testimony of Investigator Richard Martin, 2/11/98..... 26
Testimony of John Ward, 2/11/98..... 28
Testimony of Investigator Richard Martin, 2/12/98..... 29
Testimony of William Jones, 2/12/98..... 31
Plea Agreement, *Comm. v. William Jones*, 2/12/98 ... 155

VOLUME II

Testimony of Daryl Atkins, 2/13/98..... 160
Guilt Verdict, 2/13/98 212
Testimony of Dennis Tuinei, 2/14/98..... 213

---

*This is a Lodging bound separately and numbered consecutively beginning with L1.

TABLE OF CONTENTS – Continued

Page

Testimony of John Hultquist, 2/14/98 220
Testimony of Kevin Phillips, 2/14/98 225
Testimony of Amanda Hamlin, 2/14/98 233
Testimony of Mark Armitage, 2/14/98 237
Testimony of Mary Sloan, 2/14/98 240
Admission of Exhibits, 2/14/98 248
Argument to Judge, 2/14/98 249
Testimony of Dr. Evan Nelson, Ph.D., 2/14/98 267
Criminal Orders in Priors, 2/14/98 294
Dr. Nelson Evaluation (from January 15, 1998) 302
Transcript from *Comm. v. William Jones* (Circuit Court York County) of Testimony of Investigator Lyons, 4/28/98 312
Transcript from *Comm. v. William Jones* (Circuit Court York County) of Court Colloquy with Jones, 4/28/98 313
Transcript from *Comm. v. William Jones* (Circuit Court York County) of Court Sentencing Jones, 4/28/98 315
Defense Argument at Post-sentencing Hearing, 4/28/98 317
June 30, 1999, Letter Report of Dr. Robert S. Brown, Jr., M.D., to the Honorable N. Prentis Smiley, Jr., 7/6/99 319
Testimony of Mary Sloan, 8/18/99 337
Testimony of Mark Armitage, 8/18/99 352

TABLE OF CONTENTS – Continued

Page

Testimony of Sarah Armitage, 8/18/99 359
Testimony of George Duncan, 8/18/99 365
Testimony of Vivian Brown, 8/18/99 369
Testimony of Investigator Lyons, 8/18/99 372
Testimony of Dr. Leah Bush, M.D., 8/18/99 388
Entry of Disposition Orders from Priors, 8/18/99 ... 404
Testimony of Dennis Tuinei, 8/18/99 405
Testimony of Shane Stoops, 8/18/99 407
Testimony of John Hultquist, 8/18/99 408
Testimony of Kevin Phillips, 8/18/99 409

VOLUME III

Testimony of Amanda Hamlin, 8/18/99 411
Defense Proffer re: Atkins's Admissions, 8/18/99 ... 413
Testimony of Phillip Atkins, Jr., 8/18/99 414
Testimony of Virginia Atkins, 8/18/99 422
Testimony of Dr. Evan Nelson, Ph.D., 8/18/99 429
Admission of Defense Exhibits 6-12, 8/18/99 470
Testimony of Dr. Stanton Samenow, Ph.D., 8/18/99 472
Order of Conviction, City of Suffolk Juvenile Court, 8/18/99 488
Criminal Orders, Circuit Court for City of Hampton, 8/18/99 491

TABLE OF CONTENTS – Continued

Page

Testimony of Dr. Stanton Samenow, Ph.D., 8/19/99 523

Presentence Investigation Report Prepared by Pamela W. Dickerson on October 18, 1999, 10/26/99 537

Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999), 1/8/99 574

Atkins II, Assignments of Error, 3/6/00 601

Atkins v. Commonwealth, 260 Va. 375, 534 S.E.2d 312 (2000), 9/15/00 605

Letter from Supreme Court of the United States Granting Motion for Leave to Proceed In Forma Pauperis and Granting Certiorari on One Question, 10/1/01 635

[164] Amanda Hamlin

* * *

Atkins, at that time?

A Yes, I did.

Q Would you describe for the jury, please, what happened.

A I had just finished cutting my grass. And I have a riding lawn mower, and I was backing into my shed in the back of my house. And as I turned my head around like this (indicating), when I was backing around, before I came back around, he slapped the gun up against my face. And I forget what dialogue took place, but that was when I first came in contact with him.

Q And was he facing you or behind you at that time?

A To the side.

Q Okay. What happened after he slapped the gun against the side of your head?

A He told me to get off the lawn mower. And my foot got caught some kind of way. So he came around to this side of me and helped me to get my foot out. And after that, I stepped down on the ground, out of the house down on the ground, and he caught me by the shirt that I had on and led me around to the front of my house.

Q Where was the gun at that time?

[165] A I don't remember. Maybe I just – I don't know, I just don't remember seeing the gun then.

Q Did you have any sense that it had been put away?

A No, I just –

MR. ROGERS: If your Honor please, I object to the form of the question. Counsel knows better than that.

THE COURT: Sustained. Rephrase the question.

BY MS. ADDISON:

Q When you got around to the front of the house, Ms. Hamlin, what happened then?

A We were standing in front of my den window, and he took the gun and hit me in my head and knocked me down to the ground.

Q And what happened after that?

A Then he, some kind of way, he assisted me in getting up off the ground. And after that, he started to go up my driveway like he was leaving. And I started to walking towards my door to go in the house. But I was afraid to run because I was afraid that maybe he would turn around and look at me and see me and shoot me for running.

[166] So I went to the other side – we had two cars in the driveway, I went to the side of the other car and I was just standing there. And he went up the driveway and came back around and put the gun to my stomach and shot me.

Q What happened after that, Ms. Hamlin?

A I don't even remember him leaving. I know he did. I went up on the porch and knocked on the door.

And I told my daughter to call 911. And I just laid down on the front porch, and I told her not to come out of the house because I didn't know where he was.

And the next thing I know the ambulance was there and there were a lot of people there. Evidently I passed out. I don't know what happened.

Q And describe, if you would, what medical treatment you received after that?

A I was in the hospital, at Riverside Hospital for 21 days. As a result of the gunshot wound, I received a colostomy.

Q Any other surgeries after your 21-day hospital visit?

A I went back in March of 1997 and I

* * *

* * *

[Defense Proffer Re: Atkins' Admissions]

[182] would expect Investigator Lyons to give in answer to Mr. Rogers' question, is going to be he partially confessed. He admitted to some part of it. It's going to elicit that denial, which is exactly what this Court has ordered not be presented to this jury.

THE COURT: The Court stands by its ruling, Mr. Rogers.

MR. ROGERS: Note exception, if the Court please.

Let me make one other proffer that I intended to go further with Investigator Lyons on. And I would make a proffer that based on the testimony of Detective Lyons in the Hampton Circuit Court, Part Two, done on March the 7th, 1997, before the Honorable Judge Walter J. Ford of that Court, Detective Lyons testified in that case that he was present when the Defendant admitted his involvement in the crimes in Hampton, all of which have been put in evidence as to the orders of conviction and which the Commonwealth has elicited the complainants from those cases.

If the Court please, on that same basis and in that case, all those cases in Hampton, which took part in the springtime before this case

* * *

---

* * *

[187] Phillip Atkins

A Yes, ever since 1985.

Q All right. Okay. And she has remarried?

A Yes, sir.

Q Now, Mr. Atkins, how many children did you and the present Ms. Bullock have?

A We had one child, that was Daryl.

Q And Daryl Renard Atkins is who you are referring to, who's seated here in the Courtroom?

A Yes, sir.

Q And he's your son?

A Yes, sir.

Q He is the only child of your marriage with the present Ms. Bullock?

A Yes, sir. Daryl is my only child.

Q What year was he born, Mr. Atkins?

A Daryl was born in 1977.

Q And do you remember what date in '77?

A November the 6th.

Q Where was he born?

A He was born in Hampton, at the Mary Immaculate – old Mary Immaculate Hospital.

Q And where did you and the family [188] live after his birth?

A We had stayed at the – it's apartments, Glen Garden Apartments in Hampton. We stayed there for about eight years of our marriage.

Q Okay. And at the time that you and your wife separated and got the divorce in 1985, who got custody of Daryl?

A His mother had custody of him.

Q And where was she living at that time?

A She was living in Hampton at Coliseum Apartments, where I'm staying at now. She was down – further down, Coliseum Apartments in Hampton.

Q And did you have visitation in the divorce with your son, Daryl?

A Yes, we had an out-of-court settlement and everything, and we had – I had visiting rights and everything. Both lawyers got together, and we had an agreement and how much I'll pay on child support and visitation rights.

Q In what school systems did Daryl go to school when he got old enough?

A Well, he started at a day care center, Ivy Baptist Church, he had started there as [189] a day care center, and he went down to Aberdeen School, and from there to Bethel – Bethel High School.

Q Okay. Did he graduate from Bethel High School?

A No, sir.

Q How did Daryl do in school as he was coming along?

A Well, he was – we had sent him down to Buckroe Beach because of his – his grades. He was falling – he was falling behind at Bethel, Bethel High School, so we had sent him down to Bayside Beach so they could help him more. And –

Q Was that the skill center, part of the Hampton Public School System?

A Yes, that was the skill center.

Q And that's for those who have difficulty in school and are not accomplishing their work?

A Yes, sir.

MS. ADDISON: Your Honor, I would ask that the questions not be leading.

MR. ROGERS: I apologize.

THE COURT: Rephrase the question.

BY MR. ROGERS:

[190] Q Mr. Atkins, were you aware at a time when Daryl was a juvenile when he got in trouble with the Court system?

A Will you rephrase that again, please.

Q Were you aware of a time when Daryl was a teenager, a young teenager, that he got in trouble with the Court system?

A Yes, sir.

Q And were you notified to go to Juvenile Court with him?

A Yes, sir.

Q Okay. After that, did – did he continue to be in the custody of his mother, your ex-wife, Ms. Bullock?

A Yes, sir, at that time he still was in custody with his mother.

Q Now, did custody – strike that. Was there ever a time when Daryl came to live with you?

A Yes, I would pick him up, like, on – by working at the shipyard all the time and a lot of times on weekends and stuff, I'll pick up Daryl and we spend as much time as we can together. But Daryl, I think, when he was ten –

well, you [191] see, Daryl was right upset when we got our divorce.

It kind of – I always thought that it was the parents was the ones that gets hurt a lot in divorce and everything, but Daryl always kind of took it kind of hard. And he never was the same. He always wanted to be with his mother and he always wanted to be with his father. So we kind of – kind of worked things out, but still Daryl was – I guess he still kind of missing, he still was kind of upset over this, over the divorce and everything.

Q Now, Mr. Atkins, directing your attention, sir, to the summertime – spring or summertime of 1996, before that time, where had Daryl been living?

A Oh, he was living with his mother.

Q Okay. And was there any change in where he was living in the spring or early summer of 1996?

A Yes, he came and I – at the time, he was – he was staying with his mother, so I – at the time they kind of got a little upset, you know, with each other, so he came and stayed with me for that length of time.

Q So that was in the spring or [192] summer of 1996?

A Yes, sir.

Q Who else was living there, if anyone, with you and Daryl?

A It was just me and Daryl.

Q And you were working at the shipyard?

A Yes.

Q What shift did you work?

A I was working the second shift, from four to 12.

Q Okay. Four in the afternoon to midnight?

A Yes.

Q Okay. During the time when Daryl moved to you during that spring or summer of 1996, was he working?

A No, I had him – I took Daryl – well, he couldn't graduate, he had enough grades, it would cost me quite much to try to get him to graduate, the courses at the Bethel High School. So we took him – I took him down to the lady down at the – the guidance counsel lady fixed things up downtown Hampton that he could get a GED. So that's when I start taking him – and all – sometimes he

* * *

[194] Sussex State Prison, in Waverly, Virginia.

Q Okay. And are you able to visit him there?

A Yes.

Q What is the – explain to the ladies and gentlemen of the jury what the procedure is for you to visit your son up there at Sussex prison outside of Waverly.

A Well, it took – well, it took a long time for the state to approve us, almost – I guess it was almost a year for them to approve us. So finally we got a chance to see him.

Q When you say we, who are you referring to?

A Me and my mother.

Q Your mother's name is?

A Ms. Virginia Atkins.

Q Now, how often are you able to see Daryl?

A Well, we see him about – since the four months that I described to you, I have been seeing him about every week, every weekend, every Saturday. But other times before that, four months ago, we used to see him every two weeks, every Saturday, most times visit be on a Saturday.

* * *

[199] A Yes, he was with me when he was serving his weekends in jail.

Q And he was with you in April of 1996?

A I don't know. I don't know the month.

Q You're not sure. What about June of 1996, was he living with you by that time?

A I guess Daryl was with me – I know he was with me about a couple – I guess about three or four months before all of this had happened.

Q You said he got arrested in August of 1996, so would he have been living with you two months before?

A Two months, something like that, I guess, two or three months, my guess.

Q Okay. So you had absolutely no idea what kind of things he was up to in all of those Hampton cases?

A No, I didn't.

Q Did you see anything that gave you reason to worry about what he was doing?

A Well, that was – Daryl was always, like you say, a follower, and I had problems [200] with, at that time, William Jones. I just couldn't get him to stay from around my apartment.

Q Uh-huh. But you didn't have any idea that he was committing all of these crimes during that time?

A No, huh-uh.

MS. ADDISON: I have no further questions, your Honor.

THE COURT: All right.

Mr. Atkins, thank you for coming. You can have a seat in the Courtroom or you're free to leave.

THE WITNESS: Yes, sir. Thank you.

MR. ROGERS: Call Virginia Atkins.

THE COURT: Wait just a moment, please before you call her in.

We have been graded by a distinguished presence of a gentleman by the name of Harold Baumus.

Mr. Baumus, the Court would like to welcome you to the York Circuit Court.

Mr. Baumus is a distinguished citizen of Virginia. He's the retired Executive Secretary of the Virginia Municipal League, served in that capacity for some five

decades, from the [201] '30s through the '70s. He is 93 years young.

Among his other accomplishments are the fact that he fathered two daughters that I know of, Barbara and Nancy. Nancy Kane, the Clerk of this Court, is also his daughter. She's seated back there beside him.

Welcome, sir.

MR. BAUMUS: Thank you, your Honor.

THE COURT: Virginia Atkins, please.

THE CLERK: Virginia Atkins, come into the Courtroom, please. Virginia Atkins.

THE COURT: Ms. Atkins, if you'll come to the witness stand, please, up that ramp.

VIRGINIA BANKS ATKINS,

called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[202] BY MR. ROGERS:

Q State your name, please, ma'am.

A My name is Virginia Banks Atkins.

Q And, Ms. Atkins, I know it's not a very gentlemanly thing for me to do, but under the circumstances

and the location and with the example of the gentleman who was just graciously introduced by this Court, how old are you, ma'am?

A I'm 55, soon be 56.

Q What relation are you to Daryl Atkins, the Defendant in this matter?

A I'm Daryl Atkins step-grandmother.

Q So have you known him all of his life?

A Just about. I think he was three-and-a-half or four, something like that.

Q Ms. Atkins, you were aware that Daryl was locked up back in the summer in August of 1996 as a result of the case that we're in Court today on?

A Yes, sir.

Q Has he been out of jail since that time?

A Not as I knows of.

If he had been out, would you have [203] known it?

A Yes, sir.

Q Okay. So he has not been out of jail since then?

A I don't – I can't recall. I don't think so.

Q Okay. How often do you see Daryl, Ms. Atkins?

A I try to see Daryl at least three times a month.

Q Okay. And do you go up with anybody to visit him over at Sussex Prison in Waverly, Virginia?

A Yes, I go with my stepson, Phillip, Junior.

Q Okay. Phillip Atkins, Junior, is your stepson?

A Yes, sir.

Q Okay. And he's Daryl's father?

A Yes, sir.

Q Ms. Atkins, the Commonwealth asked a similar question of Phillip, Junior, did you have any idea or see any signs that Daryl, in the summer of 1996, early '96 through the summer of 1996, was getting involved in all of this criminal activity?

[204] A No, sir, not at all.

Q During that time period, do you know where Daryl was living?

A In 1996, if I'm not mistaken, I think he was living with his mother.

Q Was there a time in that year of 1996 that he went to live with his father, Phillip?

A In '96? Now that I can't recall. I don't think so. But I'm not recalling.

Q You do remember when he was arrested on this charge in York County, is that right?

A Yes, sir, I was devastated.

Q Ms. Atkins, what – what effect has this had on you, ma'am, as his step-grandmother?

A Very hard. Very hard. I'm not a well person. And to see my grandson, you know, in such big trouble.

And may I also add something while I'm here. And to see the Nesbitt family in such distress. It really does something to my heart. And so right now I would just like to say to the Nesbitt family that anything that my grandson has done to cause you much pain, please accept my apologies, because it's been very hard on me, too. [205] It's really been hard.

Q Yes, ma'am. Mrs. Atkins, would – is religion an important part of your life?

A Very important. Very.

Q Are you a lady who prays?

A Yes, sir, every minute of the hour I'm praying.

Q And have your prayers not only been for the Nesbitt family but have they also been for your grandson, Daryl?

A Also for the Nesbitt family as well as for my grandson, and for the whole family, everybody that was involved, I've been praying, because I'm that type of a person.

Q Now, Ms. Atkins, you are aware, are you not, that the minimum that this jury can sentence Daryl to is life in prison without parole? Is that your understanding?

A Yes, sir, I think I heard that in Court yesterday, life without parole.

Q And you understand that means that under any circumstance he will never get out of prison so long as he lives, do you understand that?

A Yes, sir.

Q Do you have anything to say to the [206] ladies and gentlemen of the jury about what your requests would be as to their consideration of Daryl for the death penalty?

A Yes, sir, very much so.

Ladies and gentlemen of the jury, as I said, I'm Virginia Banks Atkins. But I am very sorry for what's happened, for whatever part my grandson played a part. But I ask you if you could just find in your heart to forgive Daryl for anything that he have done and to give him life without parole, I will be most gracious for your consideration. And I thank you all so very much.

MR. ROGERS: Thank you, Ms. Atkins. Answer any questions that the Commonwealth may have.

MS. ADDISON: Thank you.

CROSS-EXAMINATION

BY MS. ADDISON:

Q Good afternoon ma'am.

A Good afternoon.

Q You said that you have known Daryl since he was three-and-a-half or four years old?

A Yes, sir – I mean, yes, ma'am. [207] Excuse me.

Q Approximately how often did you see him when he was growing up?

A Well, I didn't see him that much unless his father brought him to the house. And my husband is a farmer –

and you didn't ask me, but I'm going to tell you how long I used to see him – my husband is a farmer, retired, but he was a farmer. Phillip, Junior used to come and help his father, and he used to bring Daryl over to me and Daryl used to spend some time with me.

Q And I believe it is true his parents separated and divorced in 1985, is that correct?

A Well, I'm afraid to say what year it was that they divorced because I really don't know what year.

Q Were you aware when that happened?

A Was I aware when that happened? Yes. Yes, uh-huh.

Q And were you aware where Daryl was living after his parents separated?

A Yes, if I'm not mistaken, I think he was living with his mother.

Q From that point on, how often did [208] you see him?

A Not too often. Not too often at all.

Q Can you give us an idea how many times a year or how many times a month?

A Maybe I see him about maybe once or twice a year.

Q Once or twice a year?

A Yes, ma'am.

Q Were you aware in 1991 when he got in trouble with the Court in Suffolk?

A In '91, I believe I heard his father say something about the situation.

Q But you didn't – you weren't personally involved or didn't talk to Daryl about it?

A No, ma'am.

Q What about in 1995 in Hampton, were you aware of him being involved with the Courts again?

A Not at all. I was not aware of that.

Q During that spring and summer of 1996, did you have any idea what kind of things he was involved in?

[209] A No. No.

Q Were you surprised by all of that, ma'am?

A I was devastated. I was very devastated by what condition or whatever he was involved in, very devastated.

MS. ADDISON: Thank you.

I have no further questions, your Honor.

MR. ROGERS: No additional questions. She can be excused.

THE COURT: Thank you, Ms. Adkins. [sic] You may have a seat in the Courtroom or you're free to leave.

MR. SAUNDERS: Call Doctor Evan Nelson, your Honor.

THE CLERK: Doctor Evan Nelson, come into the Courtroom, please. Doctor Evan Nelson.

THE COURT: Come to the stand, please, sir.

MR. SAUNDERS: There are some exhibits that are over here, your Honor.

THE COURT: All right. Are you going to need the – tripod?

[210] Testimony of Dr. Evan Nelson

MR. SAUNDERS: They have been previously marked 6 through 12, your Honor, Defense Exhibits 6 through 12.

THE COURT: All right.

DOCTOR EVAN STUART NELSON,

called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAUNDERS:

Q Good afternoon. State your name for the Court.

A Good afternoon. I'm Doctor Evan Stuart Nelson.

Q And, Doctor Nelson, would you go into some of your educational background?

A Sure. I have a Ph.D. in clinical psychology, from the University of N. C., at Chapel Hill. I have an internship at the Indiana University School of Medicine in Indianapolis.

* * *

[220] BY MR. SAUNDERS:

Q Doctor Nelson, did you have occasion to meet Mr. Atkins?

A Yes, I did.

Q What was the – that occasion?

A I was appointed by the Court, on motion of the Defense Attorneys, to evaluate him to assess the presence or absence of mitigating features; that is, things that would be relevant to this here, and advise Defense Counsel about things that might be relevant to mitigation and how to present them in Court.

Q Doctor Nelson, in order to do your job that you were appointed, what did you have to review?

A Well, forensic evaluations are different than psychotherapy. In psychotherapy, I take what the patient tells me up front as their perspective, as valid, not going to spend time saying, "Okay, I want to call your spouse to verify your version of events." But in a forensic evaluation, as compared to psychotherapy, or an intake, the goal is to look at a broad tapestry of information and integrate it.

So the Defendant's self-report is [221] one piece of information, but then you have to look at lots of other things. In this case I was able to look at lots of information related to this offense, information related to his prior convictions, to be able to look at school records, psychological test data and speak with family members.

Q As far as the school records report is concerned, how far back do those school records go, Doctor?

A Oh, all the way back to – I've forgotten if it's kindergarten or first grade.

Q Have you reviewed those yourself?

A Yes.

Q And did you administer any types of tests?

A Yes, I did.

Q What types of tests?

A I gave him an IQ test, something known as the WAIS-III Intelligence Test.

Q Doctor, why did you use that particular test?

A Well, the WAIS-III, which stands for Wechsler, W-E-C-H-S-L-E-R – excuse me, W-E-S-C-H-L-E-R Adult Intelligence Scale, dash, Roman Numeral III, the WAIS-III is considered a [222] standardized IQ test. There are a number of IQ tests on the market. Some of them are for special niches of population. But the WAIS is one of the two that is recognized throughout the United States as a standard for assessing intelligence.

It's the one that's most frequently cited, for example, in state laws for identifying who qualifies for a learning disability or a mental retardation, the one that's most often cited in Federal disability laws for making determinations involving an IQ or neurologic deficits.

Q You said it's one of two tests that is standard, recognized as standard. What's the name of the other one?

A The other test for adults is the Stanford-Binet, S-T-A-N-F-O-R-D – B-I-N-E-T. And this is a test that's just used less commonly for a variety of reasons. But it's also widely recognized as a standard test for assessing IQ in adults.

Q The test that you administered, I notice it has a three. Were there any prior versions of that test?

A Absolutely. This test was originally developed in the 1940s. It was replaced

* * *

[225] ethics and incorporate some specific requirements for forensics as well as requirements for testing. Also, the American Psychology Law Society, that I belong to, has a specific set of ethical guidelines, too, on how to practice forensics.

Q Anything in connection with the use of tests that you're supposed to do?

A Absolutely. There are ethical standards about using contemporary tests, knowing the norms, using tests in accordance with the rules and how they were developed, and limiting your conclusions to the scope of what a test can accurately assess. If you deviate from the rules of how to do the test, then you no longer have a test that really has any validity.

Q Doctor, in administering the test that you did give, are there any – do you have any charts for all this?

A I do. If you'll give me a second, I'll be able to tell you.

Here we go.

Q Doctor, would you look on the back and tell us the exhibit – excuse me, it's on the front, which exhibit is that?

A Defense Exhibit 6.

[226] Q All right. And could you explain to us what this is?

A This essentially summarizes what I was just saying. In order to develop the IQ test, it's developed on 2,450 adults. It's not just given to one or two people. And there is an effort made to give it a broad range of ages and to match it to the U. S. Census. It wouldn't make sense, for example, just to give this to inner city African-Americans in Norfolk and say that represents an average for the entire society. So there's an effort to sample in proportion to the numbers of whites, blacks, males, females, Hispanics, some of the special populations or oversample, but we don't need to get into worrying about that. There are 200 additional African-Americans and Hispanics in order to do this, but that's a complicated statistical issue.

It measures IQ from 45 to 155. One hundred is the average. Now, how did we get that? That's essentially a magical number. They took the average number of answers and said that's a hundred and everything else is scored off of that, either above or below.

And most importantly, there are [227] very standardized rules for how you give this test. And the reason is that if you don't have that, you can't say that a psychologist in one state is getting the same results as a

psychologist in another state either for two different people that you're trying to say are comparable levels of IQ, or for the same person who might be retested at another time. Without those standardized rules, folks would get any score because they would all approach it in a different way.

Q All right. Doctor, now, you administered this test, you followed the rules?

A Yes.

Q Now, for a moment. This manual here?

A Yes, that's the Administration and Scoring Manuel [sic] for the WAIS-III.

Q In order to administer the test correctly, you have to follow each of the procedures in this book?

A Yes.

Q Are there subsections of this test?

A There are actually – well, there are a maximum of 16 subsections. There are 13 major [228] subsections, and 11 or 12 that you'd administer to almost everyone. There's a lot of different parts, and each part may have a different type of task for the person to do.

Q How many of those subsections did you administer to Daryl?

A I gave him all 13 of the major subsections.

Q All 13 of them?

A Uh-huh.

Q And would you explain some of the rules about how you can give this test to an individual?

A Sure. And I actually have a chart to help explain some of that. This one doesn't seem to be marked.

Q I think it's on the back.

A It is marked on the back. Defense Exhibit Number 7.

I need to tell you that in order to keep this test secure, that is, not to give away the answers of the teachers' guide, these are make-believe items that I'm putting up to show you, because I never know if one of you is going to need to take this test or one of your children. So with [229] due respect, this is a make-believe item.

There are really two general groups of questions, ones that are verbal and ones that involve some sort of performance. The verbal questions are often things like defining a vocabulary word or knowing information about the world.

So, for example, the question might be, how many eggs are there in one dozen eggs. A simple answer. You either say 12 or anything else is wrong. Score it a zero if they say anything else, and a one for 12. Some items allow you to score more than one possible point, depending on how correct it might be.

For example, what is the thing to do if a water pipe breaks in your house? A zero-point answer would be get a mop, because that's not really going to address the issue. A one-point answer might be call a plumber. That's a good thing to do. A two-point answer would be turn off

the main water valve and then call the plumber. Clearly, that's the most sensible answer. So there's three points there.

Depending on where you are in the test, there may be a rule about whether or not you [230] can ask the person, yes, calling the plumber is a good idea, but would you do something else first? In other places, you are not allowed to prompt. Again, as part of the standardization, everybody has to follow the same rules or you can get a different answer. If I decide that I like this guy and, therefore, I want to keep asking more questions, well, calling a plumber is a good idea, but give me another answer. What would be a better thing to do?

I can falsely inflate the IQ test. If I decide that I don't want to provide those inquiries, and the manual actually gives you guidelines about where you should inquire and where you shouldn't ask for more information, then I can deflate someone's IQ.

The other group of questions are performance questions. This is a make-believe matrix here. You see the box on the left-hand side has a pattern and a question mark. The question is which one of the symbols to the right of that should go in where the question mark is to complete the pattern? On the top there is an empty square and then a grayed-in square. On the bottom there is an empty arrow shape and then the question mark. There is only one correct answer here, and the answer is [231] the shaded arrow from the right that was the second or middle picture is the one that should go in for the question mark.

Some of these questions may be timed. That is, the person may only have a limited amount of time to do it, perhaps 30 seconds to complete it. If they get it done in ten seconds, they get bonus points for doing it very quickly. If they get it done for between ten and 20 seconds, they get a few less points but they still get it. If they get it done from 20 to 30 seconds, they get even less points.

Again, standardization is important because if I want to keep giving somebody extra time they may get it beyond the time limit but it doesn't mean that they would get points. So that's an example of how this test works. And as I said, there are 13 major parts, and it can take anywhere from a little under an hour to almost two hours, depending on how many questions the person gets right.

Q Can you make a valid determination of an IQ by giving part of this – these tests?

A You can make an estimate of IQ by giving a few of the subtests but that's all it is, [232] is an estimate. When you think that a major issue like a neurological problem or a mental retardation, or the other way around, academically gifted, it's important, you have to give all of the parts, because somebody might just happen to do well on the one or two parts that you give but not do well or do very well overall.

Q The parts are broken down, is there more than one question to each part?

A Absolutely. Some of these parts have 20 and 30 questions. Some of them may only have five or six questions. So there's no way when someone is taking the test, for example, to say, well, I'm going to get the first five right every single time and then I'm going to lie about everything else after that, and think that they're going to get the right score at the end, because each question or each section is adjusted to recognize that there is a different number of questions for each one.

Q So what happens if you only ask one or two of those questions?

A Well, you don't have an idea about how somebody is overall. You know, somebody may miss two questions, then get two right, then miss [233] five more, then get one right. If you just ask one question in the middle, that doesn't tell you anything about how they are going to do for the whole scale.

Q Doctor, you administered these tests. What results did you arrive at?

A Daryl Atkins' full scale IQ is 59. And there are two sub IQs that come out of this that aren't really relevant here because we're not concerned about neurological types of difficulties. His verbal IQ is 64. And his performance IQ is 60. Actually, I have a chart of this. It would help you to track all the numbers.

This one is Defense Exhibit 12. What this is is a graph of the data. On the left-hand side are his verbal scales. And I know that from where you are sitting in the jury box you probably can't see all the different numbers and letters, and I'll describe it generally.

And on the right side is the performance scales. Underneath it says the full scale IQ is 59, and that places him in the first percentile compared to the nation. That is, if you took just a hundred people at random, one person would have a score of 59 or below. Okay? So it's a [234] very rare outcome in the population at large. And that's why it has a classification also of mentally retarded.

What you see from the scales being plotted there, the bars that are sticking up on the graph are how he did on each of these 13 subtests. And underneath are some letters that tell you the abbreviation for the name of each test. And what's important here in terms of why I said there are no neurological issues is, number one, we don't have any reason to be concerned about neurological issues for Daryl Atkins. There's no serious head injury. There's no history of behavior suggesting any sort of neurological problems.

But more importantly, that the differences between his various scores are very small. You can't really see all the numbers there, but the lowest scale score he gets for a subtest is two and the highest he gets is six, so only about a four-point variation. Potentially he could have gotten anywhere from a one to a 19. So there could be massive variation.

And the lack of variation is one reason that we can feel pretty confident that there is not brain damage, because brain damage tends to [235] affect certain areas but not others. And the fact that the scales are fairly even also suggest it's a valid administration. People who are faking get very erratic patterns because they don't know how many answers to answer correct and how many

answers to answer incorrectly in order to try to get the score that they want to get. So they get very odd graphs that are pockmarked with hills and valleys rather than fairly flat lines across.

Q Now, Doctor, this is the results. Do you have any chart to help us see what you're saying, saying better than that? I'm not sure exactly which – is it possible for somebody to fake these things?

A Well, the easiest way to malinger an IQ test is just to say yes to the first one or two questions and say nothing afterwards, because if you did that to everything you would get ones across the board, the lowest scores. Of course, if you are doing that, it's going to become pretty obvious because nobody gets ones across the board except people who are so obviously severely or profoundly retarded that you didn't need to give the test in the first place. These are people that are easily picked out. So that's not much of a problem. You [236] don't have to worry about those folks.

It would be pretty hard to malinger and get a pattern like this. You'd have to have extraordinary knowledge of the test, have decided in advance which questions you're going to get, do the equivalent of card counting in your head, keep track of how many questions you've said right or wrong.

The other thing is you don't just look at the IQ score out of context of the person's history. You have to look, for example, at their school records and their academic achievement. If I saw a 59 IQ, and the person had been a member of the National Honor Society, and I just looked at a wonderful letter that he had written the day before to

the Virginian Pilot ed page, then I would probably think that somebody was trying to hornswoggle me. So you do have to look at it in the context with other information to make sense of it.

Q In connection with that, do you have to look at anything other than just these test scores to make a determination of mental retardation?

A Yes. Mental retardation is about two things. Number one, it's about an IQ of around [237] 70 or below, and there are some space there, 70 or plus or minus five points is the official criteria. As high as 75, you can be considered mentally retarded. As low as 65, 66, you can be considered not mentally retarded.

Secondly, adaptive behavior. Being mentally retarded isn't just a low score on this test. It's about lacking certain abilities to function independently compared to what you'd expect for other persons your age. That's a really important criteria. Because there are some people who can score really well or really poorly on this test but who either do or don't function well in society. So you have to go out and find out by talking with family members and school records and employment records, if they have any, about how they function in the world at large. You need the two of them together to be able to say someone is mentally retarded.

Q So did you follow through on that, on his adaptability?

A Yes.

Q Did you find anything in the information that you obtained that would lead you to believe that he was

faking or attempting to mislead [238] you in this evaluation?

A Nothing. His academic records are crystal clear that he has been an academic failure since the very beginning. He has had some very minimal behavior problems in school, but what's more striking is his poor grades, the number of times he has failed tests and classes, the number of times he has had to be put in remedial courses, the lack of success in pretty much every domain of his life. I also spoke with his parents, with his mother and his father, who described a number of deficits compared to what you'd expect an 18-year-old to be able to do on his own. Eighteen being the age he was at the time of this offense.

Q Could you just accept his word for it?

A No, absolutely not, for two reasons: Number one, he could be lying in both directions. And that is that he could be exaggerating what he can do. It's just like people who are illiterate often say, oh, yeah, I can read that, but they really can't because it's embarrassing to say otherwise. Or he could be lying the other way around, saying, hey, I can't do things.

[239] For the most part, folks who are mentally limited overestimate what they can do. When you ask folks around them, they'll tell you they can't. So they'll say, oh, yeah, I can cook, but then when you start asking their family members, they say, I can cook a Pop Tart in a toaster oven, I can boil a frankfurter, I can cook a microwave TV dinner.

So the other reason for getting someone else's word besides what somebody who might be mentally retarded or a criminal defendant tells you is they may not have an accurate perception of their behavior. And that's true with all forms of mental illness, that part of it usually is lacking some degree of insight. You have to ask some other folks to see what other people say.

Q To give the jury some means of comparison, could you tell us what the scales of an IQ test would be for an average person. Not the average hundred, but what's an average, to get to an average intelligence on the IQ score, what do you have to do?

A Sure. You have to be between around 80 to 120. Anything in that range is considered within the range of average. In the 80s [240] is considered low average, but it's still close enough to average. In the 110 to 120 range, it's considered above average, but you're not up to the point where somebody is starting to be considered really a superstar, or, for that matter, academically gifted.

So the difference between his IQ score and the beginning of average is around 21 points. Could he have scored a little higher? Probably. When I saw him, he was mildly depressed. So the chances are he could have scored two or three points higher if he had been in slightly better condition. But there's nothing to suggest that he was so impaired that he could have scored, say, 21 points higher to get into the 80-point range. That would just be an astounding difference.

Q Can you tell us, give the jury some idea of how his mental retardation affects Daryl?

A Well, the stereotype of folks who are mentally retarded isn't necessarily what happens. Folks tend to think that someone who is mentally retarded is automatically illiterate, not able to use imagination, can't do anything on their own, drools with their mouth open, has a thick head, [241] abnormal speech, and that's not true at all. There are many mildly mentally retarded folks who are able to live reasonable lives with some assistance.

As a general rule, folks – and this is true for Daryl specific – folks who are mentally retarded have a couple of problems. Number one is their social confidence is pretty limited. That is, they are just not good in social relations. They often end up either bunching up with kids who are a lot younger than them, because that's where they are emotionally, or they end up affiliating with people who are a lot older than them and they are going along with the crowd. This is a common problem that folks with limited intellect are more likely to be pulled along with the crowd, in part because they want to fit in and in part because their own ability to apply social reasoning and make more independent decisions is impaired.

Number two: Folks with mental retardation are just slow learners. And I'm sure you've heard this expression, oh, he's a slow learner. That means a lot of different things. It means that it is harder for them to succeed in school and they are quicker to get frustrated. It means it's harder for them to do just about anything [242] in life, whether it's to get a job or work out a relationship, benefit from the feedback of the supervisor or the teacher, and they just don't get as far.

The other way in which mental retardation tends to affect functioning overall is that their abilities and their goals are usually equally circumscribed. It's a fancy way of saying that you can't really shoot for the moon if there's no chance of building a rocket.

Q Doctor, do you happen to do any disabilities?

A I do.

Q All right. I mean, evaluations for Social Security Administration.

A Right.

Q All right. Would Daryl qualify for that if he was out of prison?

A Oh, abundantly, because he's got both very limited IQ and the school records that really back it up.

Q Now, Doctor, as a psychologist, can you predict whether somebody is going to be a danger in the future?

A Predict a specific incident, no. [243] Assess general risk factors, yes.

Q Did you do that in this particular case?

A Yes.

Q And what did you base your assessment on?

A All of the data in front of me as well as the knowledge of the research on future dangerousness, which has identified the issues that are related to risk, not guesswork.

Q And did you review any records from prisons?

A Yes.

Q What did you review?

A I was able to review records from the Department of Corrections, where he's currently housed, as well as I was able to get some information from deputies about his functioning at the last jail that he was at for 17 months, I think, before he was sent to prison.

Q All right. Doctor, and you say you can't predict, right?

A You can't predict a specific event but you can talk about as to whether someone is at higher or lower risk in a specific environment. [244] Environment makes a big difference.

Q In Daryl's case, could you predict whether he would be a danger of future violence in society if he was out?

A If he was out, yes. We have statistical models, actuarial tables that can tell you the likelihood that he would be rearrested for a violent offense. Just as when you call your insurance agent and say, hey, I'm a Caucasian male, married with two kids, I don't smoke, my age is thus and thus, what is my life expectancy, and how much is my insurance premium, we can do the same sorts of things for folks who are released to the community, look at a set of characteristics, look it up in a table and tell you that people with similar characteristics, what proportion of them were rearrested for a violent offense, ten percent, 50 percent, 90 percent.

If we are talking about Daryl Atkins re-released to the community, I'd actually be able to tell you a number,

tell you the base rate for that number and the statistical likelihood that it was right or wrong.

Q If he's in prison serving life without possibility of parole, what would your [245] opinion be about his future dangerousness in that situation?

A Overwhelmingly, that there is no significant issue.

Corrections does a marvelous job of containing violence. We have almost 30,000 inmates in the Virginia Department of Corrections and an exceedingly low rate of violence and murder compared to what you'd expect when we look at comparing what happens in prisons to what happens in Virginia society at large. And that's amazing when you consider the fact that we're concentrating 30,000 of our worst citizens in those facilities.

Prison is a highly effective environment for controlling violence for several reasons. Number one, the biggest issue behind violence is very well controlled by comparison to the community, and that is alcohol and drug access. Are there alcohol and drugs in prison? Sure. There's a black market for some of those. But the incidence rate is a lot less than being able to run out down the corner and locate marijuana, alcohol, crack cocaine, heroin, take your pick, very easily. And when you have folks that are sober, you greatly reduced the likelihood of impulsive violence, which [246] is what most acts of violence are.

Number two is there is security all the time. Folks are locked down, their movements are tracked, their rooms get searched. They are separated from potential enemies.

If their behavior is a problem, they get segregated, such as the normal things that happen in jails and prisons greatly reduce the likelihood of someone doing violence to another person. We certainly have it, but we actually have real data, and I have some of it that I can tell you about, about the real base rate of murders and violent incidents in Virginia prisons.

Q Do you have a chart on that?

A Yes, I do.

Q Show that to the jury.

A This is Defense Exhibit 10. I apologize, this one is a little smaller. It's actually – wasn't intended to be used in this large setting, it's used for one of the trainings that I to on violence risk assessment.

The Bureau of Justice Statistics as a Federal arm of the government that collects the officialdata from jails, State prisons and Federal prisons throughout the country, and then publishes [247] them in a compendium every year. They don't always ask the same questions every single year. They may sample different pieces of information in different years. So one of the problems in looking at it is trying to figure out what they were assessing in a given year and what your question is.

The last time that they reported two consecutive years in a row for suicide, executions, murders and assaults or injuries was 1992, 1993. They haven't done anything else where they have had two or more years with the same questions.

The reason that I look at two or more years is – again, you're back to the issue of how do you know that one

year isn't a fluke. If you get one year with no murders, does that indicate the real base rate? If you get one year with three murders, does that indicate the real frequency that this occurs? So you want to kind of look at averages.

In 1992, Virginia's official lumbers were 54 deaths in prison. In 1993, they didn't report a total, although you can infer, if you really wanted to, from other sources as I have, and it's slightly more than 54. The number is [248] probably going up because of AIDS and also now hepatitis C. But, again, that's not related here.

At that time, when this was prepared we had 20,000 inmates in Virginia prisons. Now we have close to 30,000 because of changes in the sentencing guidelines. So the base rate per 100,000 people in the prisons is around 7.5 per 100,000. That is the murder rate, 7.5 per 100,000 prison residents you would expect to be murdered. The national incidents for homicides was 9.4 per 100,000. So in terms of the actual rate of murder, the rate of murder in a Virginia prison is lower than the rate of murder in society at large.

That's good news. That means prison is doing what it's supposed to do, taking the folks who are most violent and aggressive in society, keeping them appropriately constrained from hurting each other in the most severe ways.

When we look at aggravated assaults, that is, assaults where somebody got injured in a significant way, the base rate there is higher than society at large but not as high as you think. For a prison you come out with 750 per

100.000, and the base rate for aggravated assaults nationwide was 440 per 100,000, so a little less [249] than twice as high as society at large.

Again, I would argue that dangerousness is a really well-controlled issue in prison if it's barely one-and-a-half times the base rate in society, and we're clustering the worst people together. Sometimes folks say, well, there's all the unreported assaults with injuries. Well, that's true for the prisons, but that's also true for society at large. There's no way for us to reasonably estimate how that affects those numbers.

So overall, my message is with the rare exception of the inmate who has been chronically aggressive, documented to be chronically aggressive in jail or prison or other types of secure environments, the vast majority of inmates represent a very low risk of ever doing something that is seriously violent again in the future.

Q In your review of his prison records, did you find anything that indicated that he was chronically violent in the prison system?

A He was actually granted the opportunity in the jail to work in the kitchen staff, which means that they trusted him to handle utensils, knives, forks, things like that. The only trouble that I'm aware of that he has been in is one [250] time on death row he refused to take a urine screen test, and his report to me was that he was just tired of taking them. He said, "It's obvious I can't get anything, what's the point." That was his perspective. But he did comply with the others. I don't consider that a violent offense.

Q Doctor Nelson, is age a risk in concurring – recurring violence or dangerousness?

A Absolutely. If alcohol and drug abuse is the most common link for homicide, age is really the next strongest issue when you look particularly at homicide. Well, that's true for certain other types of nonviolent crimes, but when. it comes to murder, age is the primary issue. As you get older, the rates of murder go down dramatically.

Q Do you have anything to help us with that?

A I do. Again, Defense Exhibit Number 9. Psychologists are social scientists. We don't just render an opinion because it meets the way we feel about an issue or how we believe something is personally. You have to look at the data. You can't know what's normal and abnormal without looking at the real data on what happens or

* * *

[254] malingering or trying to influence you in making the decisions – the representations that you made to the Court today?

A Not in the slightest. In fact, his academic grades, the data that we have on whether he failed or passed literacy tests, the data that we have on the grades that he failed, his achievement test scores are all consistent with somebody who has just not been very bright from the very beginning, period.

Q People with Daryl Atkins' IQ, are they leaders or followers?

A As a rule, they are more likely to be followers. You're more likely to see these folks in offenses that

involve groups of people and going along with the crowd.

Q Did you find anything in any of the background material or interviews with his family that indicated that he was a leader?

A No.

MR. SAUNDERS: Thank you, Doctor Nelson.

THE COURT: At this juncture, before cross-examination, the Court is going to take a brief recess, allow the jurors to stretch, the

* * *

[257] (The jury returned to the Courtroom and resumed their seats in the jury box.)

THE COURT: There are 14 members of the jury in the box. Do you waive the poll?

MR. ROGERS: So waive, your Honor.

MS. ADDISON: Yes, sir.

THE COURT: All right. You may cross your witness.

MR. HAHN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. HAHN:

Q Doctor "Samenow," when you're appointed by a court – excuse me, Doctor Evans, when you're appointed –

THE COURT: Doctor Nelson.

BY MR. HAHN:

Q Doctor Nelson, excuse me, when you're appointed by a Court to evaluate a Defendant there are three statutory inquiries, is that correct?

A When appointed under the motion for the Defense, there are three things that I need [258] to respond to in the report. That's correct.

Q And the second statutory inquiry is whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were significantly impaired at the time of the offense, is that correct?

A Correct.

Q The short answer in a nutshell to that statutory inquiry in this case is no, is that correct?

A That's the short answer, yes.

Q You have no evidence that Daryl Atkins was unable to appreciate the criminality of his conduct, to conform his conduct to comply with the law at the time he murdered Eric Nesbitt?

A His capacity is impaired but not destroyed.

Q Okay. You don't contend that alcohol and drugs would have destroyed his ability to know the difference between right and wrong?

A Not at all, no.

Q He understood it was wrong when he shot Eric Nesbitt eight times?

A Yes.

[259] Q He understood that he was committing murder?

A Yes.

Q The first statutory inquiry is whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense, is that correct?

A Yes.

Q And you've testified you observed no severe neurological defects that would have affected his mental state?

A That's correct.

Q His ideas were rational in his conversations with you, and no sign of delusion or thought disorders?

A At the time of the offense, correct.

Q And when you spoke with him he exhibited emotions appropriate to the time and place?

A Yes.

Q Did he ever cry?

A No.

Q In fact, you found that Daryl Atkins exhibited a total lack of remorse by being [260] indifferent to or rationalizing having hurt, mistreated or stolen from another one?

A I don't believe that I find that at all anywhere in the report.

Q Did you find a lack of remorse?

A I found a lack of remorse for many things. As with many criminal defendants, he had explanations or excuses or blamed other people for things.

Q You graduated from the University of North Carolina in Chapel Hill in 1991?

A Correct.

Q And you have published some books, have you not?

A No, I don't publish books.

Q Did you publish the Virginia Jail and Mental Health Services Directory?

A Yes, I did. I was an editor of it, not a publisher.

Q And what type of book is that?

A That is exactly what it says, as I described. It was an appointment from the Department of Mental Health for me to conduct a survey of all jails in Virginia and develop a catalog of the mental health services that were [261] provided to inmates.

Q Have you ever testified or qualified as an expert witness outside of Virginia?

A I'm sorry, outside of Virginia?

Q Outside of Virginia.

A In Federal Courts, but not in courts in other states. I only practice in Virginia.

Q You reviewed the records of the Defendant in the City of Hampton Schools, is that correct?

A Yes, I did.

Q And you are familiar with the term special education, as that is used as a term of art in the education system, are you not?

A It's used as a general term. There are actually more specific terms within the education system.

Q Okay. Well, there are statutory requirements for people who are to be placed in, quote, special education, is that fair?

A I – you're asking about something that is beyond me. There is specific language. I don't know whether it refers to as special education. But there are specific programs that are [262] titled to be special services that folks have to meet criteria to be in, yes.

Q Okay. And when the schools find those type of people, they have to develop what's called an Individual Education Program, or an IEP?

MR. SAUNDERS: Your Honor, I think he has already said this is outside his field of expertise. I'm not sure where this is going, but it doesn't appear to be in his field of expertise.

THE COURT: I'll permit the question. If he can answer it, he can; if not, he can't.

THE WITNESS: I'm sorry. Can you restate the question? I lost it in the discussion.

BY MR. HAHN:

Q Sure. People who have educational handicaps in schools are required by law to receive, quote, a certain special education?

A Correct. If they are tested and below and fall at or below a certain standard then they have to have an Individualized Education Plan, an IEP.

Q Okay. And that's for – do you know how an IEP is formed?

A How the IEP treatment team is [263] formed?

Q Right.

A Yes.

Q Who would it consist of?

A Again, there's a statute that says exactly who has to sit on it, but, in essence, it's members of the school. It involves consultation with the school psychologist, usually a guidance counselor is present, and they have to come up with an actual plan.

Q Okay. To address the deficiency of the student?

A Correct.

Q Okay. Did you find that Daryl Atkins ever had an IEP while he was in the Hampton School System?

A No, he did not have an IEP specifically.

Q Was he referred to a screening committee for the possibility of the development of an IEP?

A Yes, he was, on March 25th, 1991, I believe.

Q And they declined to refer him for a full evaluation, is that correct?

[264] A That's correct. They chose a different set of services for him instead.

Q Okay. In response to statutory inquiry as to whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense, your report was that it is the opinion of the undersigned that Daryl Atkins was voluntarily intoxicated on substances at the time of the offense, correct?

A Yes.

Q Do you personally know the degree of intoxication that Daryl Atkins was under at the time of Eric Nesbitt's murder?

A I don't have any urinalysis or blood data, no.

Q What is your opinion based on?

A His report that he was voluntarily intoxicated, corroboration from the Co-Defendant, his statement that they had been using substances.

Q Again, in – as I did before, the short answer to that statutory question, whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense is no?

A Correct.

Q Now, the final statutory inquiry [265] which you are directed to address is whether there are any other factors in mitigation relating to the history or character of

the Defendant, of the Defendant's mental condition at the time of the offense, is that correct?

A Yes.

Q And in response to that statutory inquiry, you opine, in the opinion of the undersigned, the Defendant met the criteria of the diagnosis of mild mental retardation?

A Yes.

Q And that's based upon the IQ test that you told us about that you gave to him?

A Correct.

Q In your review of the Hampton City School records, did you find anyone that ever indicated that Daryl Atkins was mildly mentally retarded?

A There was no one who had ever given him an IQ test in the course of his time there.

Q Well. Thank you for that answer, but it doesn't answer my question. In your review of the Hampton records, did you find anyone in the school system or any record that indicated that [266] Daryl Atkins was mildly mentally retarded?

A Well, the only people who are qualified to diagnose mental retardation are folks who are licensed by the Board of Psychology or the Board of Medicine to do so. He was never evaluated. None of his teachers expressed such an opinion, if that's the question.

Q How about did you see anything from the school psychiatrist with a concern about that?

A I didn't see anything that he was evaluated by the school psychiatrist.

Q Psychologist. Excuse me.

A I didn't see anything that he was evaluated by a school psychologist.

Q Did you see anything that he was ever referred to the school psychologist?

A He was referred for an IEP evaluation.

Q All right. And they declined to put him in special education?

A They declined to follow up with the referral and chose an alternative disposition of a different level of services. They chose instead to put him in the lowest level of classes possible, [267] short of putting him in special education, and to give him an opportunity to go to an alternative school with a smaller class size, but he'd have more intense supervision.

Q And what grade did Daryl Atkins receive in English once he went into that class?

A Well, the year that he's in Beach Side, which is his 12th grade, his grades jump up to C's and D's. He's got one A during that year.

Q And that one A was in senior English in that special school?

A I think that was the case. I didn't list the specific class in my summary notes, yes.

Q Did you find in your evaluation and investigation any evidence of severe sexual or physical abuse or chronic neglect of Daryl Atkins as he was growing up?

A None whatsoever. Very clearly stressors in the home related to the divorce and his mom's remarriage to somebody who apparently had an alcohol problem. But this was not the case of an individual who came from a home with chronic abuse or neglect.

Q Would you agree with this

* * *

[269] the rate of recurrence in the prison system is so low.

Q Well, on your testimony direct, if I understood correctly, you said you can predict better if he returns to the community than if he's in the prison system, is that correct?

A Absolutely correct.

Q What would his risk be if he's returned to the community?

A I didn't run the actuarial numbers. It wasn't relevant to someone who is going for life without parole. It would be pretty high. He has a lot of risk factors in the community at large.

Q And what are those risk factors?

A Well, it depends on which scale you wanted to use. He's got age, if he was returned to the community at this time. He's got the fact that he comes from a family where he didn't live with both parents to age 16. He's got the fact that he has prior offenses. He's got the fact that

he has substance abuse problems and was using substance abuse at the time of the offenses. Those are all examples of risk factors that go into predicting things in the community.

[270] Q If I understood you correctly, you said that the age risk factor drops off after 40 and that coincides with the hormonal changes in the male?

A Yes.

Q You testified on direct as to the statistics regarding murder, and I assume those were FBI statistics, is that correct?

A Those are the data that are reported by State jails and prisons as well as Federal prisons back to the national organization for collecting it, as I explained, the Bureau of Justice Statistics.

Q And they represent nationwide statistics?

A They have nationwide as well as in this case the breakdown by state.

Q Do you know how many murders were committed in York County in 1992-1993?

A I'm sure we could look it up, but I don't have a clue how many.

Q So if I'm correct, Daryl Atkins, if he were returned to the community, would be a risk because of his age and because of his substance abuse?

[271] A Those would be the two largest risk factors for him, yes.

Q And because of his prior history of violence?

A Exactly.

Q Would you agree with this statement: This prior – past behavior remains the strongest predictor of future behavior?

A In the community, absolutely; not for predicting behavior within the prison environment.

Q Would you agree that Daryl Atkins meets the criteria for having antisocial personality disorder?

A He marginally meets the criteria. There is probably some room to argue about whether he has some of the things you have to have before age 12 or 15, because he doesn't have some of the early conduct disorder. There is probably some argument to be made that most of his problematic behavior is substance-abuse related. But overall, yes, I would say he's just like the vast majority of criminals, he has an antisocial personality disorder.

Q Okay. I want to make sure I

* * *

[290] occasion?

A They do.

MR. HAHN: I have no further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. SAUNDERS:

Q Doctor Nelson – excuse me, I forgot one thing – the Commonwealth asked you about his school records.

A Yes, sir.

Q Asked you about certain schools, is that correct?

A Correct.

Q Did you chart Eric's grades throughout his – Daryl's grades throughout his school?

A Yes, sir, I did.

Q Do you have that chart with you?

A Yes, I do.

Q Could you tell us what exhibit that is?

A There's actually two exhibits on [291] this because it overflowed one. The first is Exhibit Number 8, Defense Exhibit 8.

Q All right. Doctor, could you go over that chart for the jury?

A Sure. Except for a little bit of time when he was in the Newport News School System, he was in Hampton pretty much straight through. So something that's rather unusual in these sorts of cases, they actually have the academic records. The other reason we have them is he's young. Most school systems destroy almost everything except a transcript after they turn around 25, about seven years after graduation. This is very hard with older defendants to do this.

Starting with first grade, he gets all satisfactory grades.

In the second grade, he actually failed. And the comment from the teacher was work of grade too difficult. So they put him back through second grade a second time. He got all S's except for a problem with reading, where he had needs improvement, NI.

In third grade, he got three satisfactories, two B's and five C's.

In fourth grade, his grades began [292] to decline, three D's and four F's, and it says in his record, placed in fifth. That is, it wasn't that they thought he was appropriate for fifth, it was a social advancement to fifth grade.

In fifth grade, his grades aren't very good there either, two satisfactories, six D's, two F's.

In sixth, we don't have his records because he wasn't in the school system.

In seventh, that's when he was referred for the IEP, the special education testing but the committee decided no screening to be done.

In eighth grade, he got all F's. And one comment on the transcript that seemed especially to characterize what folks were saying was, quote, Daryl has not improved during the last semester and, therefore, is still not meeting the requirements for promotion.

There is another piece related to this, a special test in order to pass on that I'll mention in a moment.

In ninth grade, his GPA was a D-plus.

And the two times that he took tenth grade, it was D-minus, and then that's when he [293] stops.

This also has behavior records. There were no suspensions or expulsions. There is no indications of any chronic violent behavior. There is no indications of any substance abuse on school grounds. There is no indications of severe tardies. There are some times in tenth grade particularly when he's absent but there is no ongoing pattern from a young age. He just didn't do well.

The second piece of this, because this overflowed one chart –

Q Doctor, could you give us the exhibit number?

A Oh, I'm sorry, this is Exhibit Number 11 for the Defense.

Q And that's styled what, summary of Literacy Testing Program scores?

A Correct. The LTP. And if any of you have children, you know that they have to take this test in order to go to high school and, in fact, they are a requirement per Virginia law. And as cited on the bottom of Hampton City's own LTP test, quote, any eighth grade students in Hampton City Schools who have not passed all three tests by [294] the end of the eighth grade will not have attained the status of a ninth grader and, therefore, not be promoted to high school for the 1993-94 year.

That's what was written on his eighth grade test. They start giving this at a younger age, and the vast majority of folks, fortunately, do pass it earlier on.

As you can see, when he was given it in sixth grade, he failed all three subsections.

In seventh grade, he passed. To give you an idea, though, this is scored between 150 and 300 points – excuse me, between 100 and 300 points. You need to have 250 to pass. His score was 256. He passed by a very slim margin.

And then he was given just the writing test in eighth grade. He failed.

In ninth grade, he passed. His passing score was 257, again, just barely above that 250 mark.

And then he was given it the second time during tenth grade and passed math with a wholesome 251, made it by one point.

Q Doctor, in reviewing the Hampton school records, did you find any correspondence that indicated that they were going to give him special [295] training to help him pass these tests, do you recall?

A No, I did speak with the folks at Hampton Schools to interpret the transcript. But there's no actual written letters from them other than saying that, gee, we recognize somebody to refer to a special eligibility committee but we're going to redirect that at this time.

Q Now, Doctor, the Commonwealth asked you about any indications in the Hampton School records of Daryl's mental situation. Did you review any standardized tests he was given?

A Yes.

Q Specifically, did you review the differential aptitude test for the Career Center Interest Inventory, do you recall that?

A Well, I reviewed a lot of achievement tests. I don't remember that one specific test.

Q Did any of those indicate in their standardized test scores that he was performing at a normal level?

A No. Overwhelmingly, this fellow falls below the 20th percentile in almost everything he's tested with. As you'd expect on the academic [296] achievement test, they went down and down as he went into high school. Why? Because he was falling behind his grade level in terms of his ability to read, write and do math and, therefore, when asked to do that on those achievement tests, it looks like he gets progressively lower scores. That doesn't mean he gets dumber, that just means that his academic skills aren't keeping pace with everybody else.

Q Would that be an indication that the problem has been a long-term existing problem?

A The fact that it started back in elementary school is an indication. There are some people that hit their teenage years and just stop trying. But the fact that he's having problems with focusing, with attention, with getting good grades starting as early as first grade, and is consistent all the way through, is what suggests mental retardation as compared to somebody who is just a teenager who is rebelling against the system.

Q Doctor, you've been questioned substantially about antisocial personality disorder. And you gave answers. There is no question in your mind that Daryl

Atkins would be a high risk of more violent crime in the community?

* * *

[309] Q Would you be surprised at the superintendent's memo, dated December 18th, 1991, states what must be done for students who meet all requirements for promotion to the ninth grade except earning a literacy passport? They must be provided resources, they must be classified as an ungraded student, they must be placed and take courses but they cannot be held back?

A That wouldn't surprise me.

Q Do you know how many students across Virginia passed the math section of the Virginia Literacy Test Passport in years '91 and '92?

A I have no idea.

Q Would it surprise you that only 40 to 50 percent of the students in Virginia in grades six, seven and eight passed that test?

A It's a disappointing result. Yes, it would surprise me that only 40 percent passed.

Q Would you like to see verification of that out of the superintendent's manual?

A Is the Commonwealth prone to lying? I don't think I need to see verification, thank you.

Q It is a disappointing result?

* * *

———

[Admission Of Defense Exhibits 6-12]

[314] them.

THE WITNESS: I understand. I'll keep a short leash.

THE COURT: Okay.

MR. SAUNDERS: Your Honor, I would move that Defense Exhibits 6 through 12 be introduced at this time.

THE COURT: All right.

MR. HAHN: No objection.

THE COURT: All right. Mark those Exhibits 6 through 12, Defense Exhibits 6 through 12 as part of the record and part of the evidence in the case. So marked.

(Defendant's Exhibits Number 6 through 12 were received in evidence.)

THE COURT: Anything further?

MR. SAUNDERS: Defense would rest at this point in time.

THE COURT: The Defense rests. Does the Commonwealth have rebuttal?

MR. HAHN: Yes, your Honor. We would anticipate one witness.

THE COURT: All right. Proffer to

* * *

[318] Ask the jury to come back.

THE CLERK: Will the jury please return to the Courtroom. Will the jury please return to the Courtroom.

(The jury returned to the Courtroom and resumed their seats in the jury box.)

THE COURT: There are 14 members of the jury in the box. Waive poll?

MR. ROGERS: So waive, your Honor.

MS. ADDISON: Yes, sir.

THE COURT: All right. Thank you. Call the doctor back in, if you would, please.

THE CLERK: Doctor Samenow, please come into the Courtroom.

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA	:	CASE NO. 98-8229 (6)
VS	:	
DARYL RENARD ATKINS	:	

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the hearing in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on August 18, 1999, before the Honorable Prentis Smiley, Jr., Judge of said Court.

DOCTOR STANTON E. SAMENOW,

called as a witness in rebuttal by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

[326] cross.

THE COURT: All right. Any challenge to the qualifications?

MR. SAUNDERS: No, sir, it wouldn't do me any good.

THE COURT: All right. The Court will find – will grant the Commonwealth's motion to qualify Doctor Samenow as an expert in clinical psychology, with his direction toward the forensic area of psychology based on his experience and education in the field.

Ladies and gentlemen of the jury, that, again, means this witness can opine or give you his opinion in his field of expertise.

FURTHER DIRECT EXAMINATION

BY MR. HAHN:

Q Doctor Samenow, did you evaluate the Defendant in this case pursuant to a Court order?

A Yes, I did.

Q What was the purpose of that evaluation?

A Well, it was for the purposes of [327] sentencing, and it was really to look at several factors, whether the Defendant was under extreme mental or emotional duress at the time of the crime. In fact, I prefer to use the language as the statute has it, whether he acted under extreme mental or emotional disturbance at the time of the offense, and whether he had the capacity to appreciate the criminality of his conduct, and also to look at whether there were other factors in mitigation with respect to the history of the Defendant or his character.

Q Did you interview the Defendant with regard to this inquiry?

A Yes, I did.

Q How many times?

A On two occasions.

Q When was your first interview with him?

A It was July 23rd, 1999.

Q Were there any difficulties that you first encountered?

A Yes.

Q Tell us what they were.

A Well, I arrived at the facility where the Defendant was housed at 7:45 in the [328] morning. And the Defendant at first – well, I was told by one of the correctional officers that the Defendant refused to come out and talk. And I offered, I said, "Well, can I come down and talk to him," and that's through the door of his cell. And the correctional officer said I could. And I did. And I simply said to him, "Mr. Atkins," and he was in bed, although awake at the time, I said, "I am here to interview you." And I said, "This is at the request of the Commonwealth Attorney." I said, "Your attorney knows that I am going to do this." And I said, "I think that you should come out and talk to me." And I also said that, "My understanding is that you will help yourself, and your attorney will be able to present whatever he's going to present, but you need to come out and talk to me."

And I then went back to the room where I was going to interview him, which was on the unit, and he rather rapidly came out. And there were no further problems after that.

Q Did you ascertain that the Defendant understood the nature of the proceedings and what was going on?

A Yes.

[329] Q How did you do that?

A Well, at several points during the two interviews, I asked him very specific questions. I asked him, "Who is the Commonwealth Attorney or what is the Commonwealth Attorney?" And he said – and this was his word, "Prosecutor." I asked him when the hearing was to be, and he said, "On the 17th."

MR. SAUNDERS: Excuse me just a minute. I thought this was in rebuttal of Doctor Nelson's testimony. There has been no issue raised by Doctor Nelson's testimony as to competency. And this line right here doesn't seem to be in rebuttal of anything that Doctor Nelson said.

THE COURT: Mr. Hahn?

MR. HAHN: I was just laying a foundation that the Defendant understood what the doctor was doing there and interviewing him. If –

THE COURT: I don't believe there was any issue of competency raised by Doctor Nelson.

MR. HAHN: This doesn't go to the level of competency, it's just that he understood what this doctor was doing. And since there was no dispute about that from Defense, I'll proceed.

THE COURT: All right. Thank you.

[330] BY MR. HAHN:

Q In your interviews with the Defendant, did you ascertain any evidence suggestive of mental retardation?

A I found absolutely no evidence other than the IQ score that I knew of, because I reviewed a number of materials. No evidence did I find other than that indicating that the Defendant was in the least bit mentally retarded.

Q Do you have an expert opinion as to the Defendant's intellect?

A He is of average intelligence, at least.

Q Explain the basis of how you came to this conclusion.

A Largely through several indices. One is the vocabulary and syntax that he used in talking with me. And I have many examples.

Q Can you give the jury some examples of that?

A Yes. And I prefer to go to my notes directly.

When the Defendant was talking about how little he did in school, I asked him what his mother did about this. And his words were, "She [331] encouraged me."

When I was asking him about how it was in the situation in which he was incarcerated, he said he gets frustrated. And I said, "What's frustrating?" And he said, "Well, being in here." And I said, "Well, what do you mean?" And he said, "Well, that comes automatic."

When I asked him later in the interview, "Do you think that you're basically a good person," he said, "Half

and half." He said, "There's the half that doesn't want to get into trouble, all the positive stuff."

I asked him on the 23rd of July, "Who died last week?" He said, "Kennedy." I said, "How?" "His plane crashed." I said, "Well, did anyone else die?" And he said, "I think his wife and a friend." I asked him where the plane was flying to. He did not know the answer to that. I asked him the state in which that occurred. He couldn't remember. I asked him did he know where Mr. Kennedy was going to be buried. He said he didn't know.

I said, "Well, who was Mr. Kennedy's father?" And he said, "JFK." I said, "Who was that?" He said, "He was president." And I [332] said, "About when?" And he said, "1961."

Q Did you give him any type of test or use any type of test instruments?

A I did.

Q Would you tell the jury what you did regarding those?

A I gave him some items from the Wechsler, that's W-E-C-H-S-L-E-R, Memory Scale. In the very beginning I asked him his age, when he was born, I asked him who is the president of the United States. His response, Clinton. I said, "Who was president before him?" "Bush." I said, "Who is the governor of this state?" He said, "Gilmore."

I gave him numbers to remember in sequence, a series for him to recall them forward. In other words, if I said seven, six, two, four, he would repeat them after me. He got the items correct as far as you could go, which is eight digits in a row. On digits backwards, he did not do

as well. He got four correct. What this has to do with is the ability to concentrate and pay attention when he so chooses.

I gave him a task called associate learning, and what I did was to read him items that go together. Let me restate that. I administered [333] him pairs of words that are put together. For example, black cow. House ground. And some of these go together better than others. I'm not using the actual items from the test. And there were one, two, three, four, five, six, seven – there are ten of these pairs, and I read the whole list. And then I asked him to try to recall what went with each word. And you do this three times. Initially, he had only three correct. On the second administration he had all but one correct. And on the third administration he had all but one correct.

I administered a test called the Thematic Apperception Test. And essentially what that is is you hand the person a card. It's – it has a picture. It's a black and white picture. And you ask the person to tell a story. And I did this on five cards. These, by the way, do not have a right or wrong answer, but I administered them because I was interested in how he would deal with them. Would he make up a story, was there cause effect, what sort of vocabulary would he use, would he even follow the directions. He did follow the directions.

Just to give you just one example, but there are others, on card one, which shows a [334] desk, a boy seated, and there's a violin on the desk. He said, "It's a boy with a violin." And I said, "Tell me a story." He said, "He's going to be in the orchestra," that was his word, "in the orchestra when he grew up."

I said, "What's he going to do?" "He's going to play it." And I said, "Well, what is he thinking about?" "Well, it's like he's sad." I said, "Why?" "Maybe he didn't know how to play it." I said, "Well, what finally happens?" "I guess somebody teaches him."

Now, that story had a story. It was a story. There was cause effect. There was the word orchestra. And this man throughout the interview used very sophisticated words, words such as parable, which he used in a discussion I had with him.

I also gave him some items from the Wechsler Adult Intelligence Scale. Now, I did not give him entire subtests. He had had the entire test. Doctor Nelson administered it to him. My purpose in asking him selected items was to push him just a little bit to see whether, in fact, perhaps he knew more than he had indicated previously, when Doctor Nelson had administered the test.

[335] And I asked him – well, let me say what I found, because I'm really not supposed to use the exact items in case any of you do take the test at some time. The point is that the items that I asked him, on many of them he would give me a partial answer, and if I pushed him just a little more and said, "Well, could you explain it further," he would give me a more sophisticated answer, an answer that would be a two-point answer rather than a one-point answer. And that didn't happen on every item, but it did happen on six of them. And that's six out of – let's see how many I gave him, 12. So on about 50 percent of them he did give more sophisticated answers, including answers to two very difficult items.

With vocabulary words, I did the same thing. And in several instances, by no means all, he did give a fuller response indicating that he had a better understanding of the word than he had indicated with Doctor Nelson.

I also asked him some other questions such as, "How many pennies are there in a dollar," to which he said, "One hundred." I asked him, "How many nickels are in a dollar?" He said, "Twenty." "How many dimes are in a dollar?" He [336] said, "Ten."

So the point that I'm making is that the vocabulary, not simply the test, but the spoken vocabulary, he used the term correctly with me while talking, deja vu, being a psychic. He told me, "I can do math." These are his words, quote, "I can do math, subtraction, Algebra, Geometry, fractions, decimals, reciprocal fractions. Money, I can count good, add good, but I failed math. I ain't do nothing."

"Science, I can do a little chemistry. I used to know the elements, pi, P-I, is 3.15. I watch Jeopardy and Wheel of Fortune shows. I can solve the puzzles before anyone else can."

Q Doctor Samenow, did you review Daryl Atkins' school records, the same records that Doctor Nelson reviewed?

A I did.

Q What is your opinion regarding his academic performance, or lack thereof?

A His academic performance was by and large terrible. Translated into more exact terms, D's, and F's, largely. There were times when he had A's and B's. There

weren't many. But his school records are punctuated with statements by [337] teachers about his lack of motivation, his lack of concentration, a statement that he could do better, a discussion of – or a citation of poor study habits.

He passed the Literacy Passport Tests, not by a lot, but he did pass them, which are necessary to be in the ninth grade and be eligible for a high school diploma. And I cannot recall seeing in one place a statement by a teacher that he was unable to do the work or that they suspected that there was an intellectual deficiency.

It was constantly problem with authority. Tardiness. Loitering. Disciplinary problems. Problems that had to deal with attitude. And in some cases, as I say, not in many, well, there was a notation about improvement in three subjects, basic subjects. I think it was writing, science, and there was one other. So this is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do.

Q Doctor Samenow, let's get to the statutory inquiries that you're required to take a look at and give your expert opinion on, the first being whether the Defendant acted under extreme [338] mental or emotional distress at the time of this offense. Do you have an opinion regarding that issue?

A I do.

Q Would you tell the jury what that is?

A He did not act under extreme emotional or mental distress at the time of the offense.

Q How did you come to that opinion?

A Well, Mr. Hahn, I couldn't find anything. I mean, the man was intoxicated, and by that, as he explained it to me, early on that date, I believe the date was August the 16th of 1996, he and his Co-Defendant were drinking. They drank beer. I think he told me that they had some gin as well. They smoked some marijuana. This was not an unusual thing, he told me. I mean, he used marijuana. He drank alcohol. He had done it on other days, but he was intoxicated. But that voluntary intoxication did not impair him so that he could not plan, deliberate, or act in a planful manner.

Q Was the capacity of the Defendant to appreciate the criminality of his conduct or to [339] conform his conduct to the requirements of the law significantly impaired at the time of the offense, in your professional opinion?

A No.

Q Tell us why.

A Well, the crime itself required planning and forethought and deliberation at virtually every stage.

Q Now, the third inquiry is whether there are other factors in mitigation relating to the history or character of the Defendant or the Defendant's mental condition at the time of the offense. And you are aware that the Defense has offered into evidence the opinion of Doctor Nelson that the Defendant is mildly mentally retarded. Do you share that opinion?

A No, I sharply disagree with it.

Q When is mental retardation usually diagnosed, Doctor? Are you aware of that?

A My understanding is that it usually appears when the person is a child, certainly before the age of 18, and is usually noted somewhere by somebody in the schools, if not within the family.

Q Are you familiar with this small [340] book I'm holding, DSM-Four?

A I am. I have a large version with me.

Q Would you turn to – well, my page number would differ from yours. Turn to the section on mental retardation.

A I have it.

Q What is that chapter – what is the title of the chapter dealing with mental retardation?

A The overall chapter title is Disorders Usually First Diagnosed in Infancy, Childhood or Adolescence.

Q Are there two criteria – do you agree with Doctor Nelson? He said there are basically two criteria in mental retardation, significant subaverage intellectual functioning and impairment in adaptive functioning basically meeting the effectiveness of standards expected for his age by his culture group.

A Those are the two criteria, yes.

Q Can you tell us whether you believe there is any impairment in his adaptive function or whether he meets the standards expected for his age by his culture group?

[341] A Well, Mr. Atkins never lived independently. In other words, he was not a self-supporting member of society. However, he told me he was able to wash his

clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.

This Defendant, Mr. Hahn, as I understand it, lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school either.

So the point is he chose a certain – to live a certain way of life, and there was no lack of ability to adapt and to take care of basic needs, certainly.

Q Have you given any thought to the Defendant's future dangerousness?

A Yes.

Q What would you think, in your opinion, is the best predictor of future behavior?

A Past behavior.

[342] Q Does the fact that Daryl Atkins' prior crimes involve confrontation of victims, is that significant in any manner in assessing risk of future dangerousness?

A Yes, I think it is.

Q Would you tell the jury why you feel that way?

A Well, put another way, if a person has a pattern of violent behavior, that is not a definitive predictor, I mean, there is no definite predictor, but it is about the best that we have in terms of risk factors. So violent confrontation

with other people, with or without a firearm, of course, particularly with a firearm, certainly is a negative harbinger for the future. It is a significant risk factor for their violent behavior.

Q Do you believe that Daryl Atkins is diagnosable as having antisocial personality disorder?

A I do.

Q Why is that?

A Well, there are a number of criteria listed in the book that you just referred to, the Diagnostic and Statistical Manual, Fourth Edition, and he meets most of those criteria.

[343] Q Are there seven criteria?

A I believe so.

Q Okay. Would you just quickly go through and tell us how many you think he meets?

A Bear with me while I find the right page so I can refer to these.

Do you want me, Mr. Hahn, to go down the list, or how do you want me to do this?

Q If you would just read the seven – how many do you have of the seven items does he have to meet the antisocial personality behavior, or disorder?

A Well, it says here there is – that diagnostic criteria there is a pervasive pattern of disregard for in violation of the rights of others occurring since age 15, as indicated by three or more of the following, and then there are seven criteria listed.

Q All right. So he has to meet seven – three of the seven?

A Three of the seven. And then there are three categories thereafter.

Q All right. How many of those seven items do you think Daryl Atkins meets?

A Seven.

[344] Q What significance is that regarding risk factor of future dangerousness?

A Well, among the criteria for antisocial personality are reckless disregard for safety of self or others and lack of remorse, as well as irritability and aggressiveness. Now, this Defendant has shown all of these.

And so, again, if you are looking at the character of a person, the personality of an individual, that person's mental makeup, again, the past is the best indicator we have in terms of risk for the future.

Q Did he ever exhibit any remorse for what he did, to you?

A Not to me. In fact, he said he was angry at having to be in prison.

Q What's the implications in that statement for his future dangerousness?

A I think, Mr. Hahn, that really what it says – may say a lot more, but I think it simply says that he's thinking about himself and what he's going through. I can't read his mind. I don't know if he's giving any thought to the victim and the victim's family. He did say to me, in

answer to a question that I asked, that he knew that [345] the victim had a family and that the family was hurt. But his anger is at the circumstances in which he finds himself. And that was his emphasis.

MR. HAHN: I have no further questions.

THE COURT: All right. I'm going to recess for the evening.

Doctor Samenow, you may stand down. I'm going to recess until tomorrow.

THE WITNESS: Thank you, your Honor.

THE COURT: Be ready to proceed with your cross-examination in the morning, okay?

MR. SAUNDERS: Yes, sir.

THE COURT: Ladies and gentlemen of the jury, during this evening recess, again, I caution and admonish you not to engage in any discussion or engage in any conversation with any party, any of the witnesses or the attorneys or any of the spectators.

You are not to go to the scene nor undertake any independent investigation.

No one should approach you to discuss the matter, and you should not remain within the hearing of anyone who is discussing this case.

* * *

VIRGINIA: IN THE JUVENILE & DOMESTIC RELATIONS DISTRICT COURT FIFTH DISTRICT CITY OF SUFFOLK

In the Matter of)
) ORDER
DARYL RENARD ADKINS [sic]) J-10475-01/02
a child 13 years of age

This matter came on to be heard on the attached petition(s) on this date, at which hearing said child was present in Court in the company of his father and was represented at all times by Wayne Sprinkle, Esquire, his counsel. And it appearing that said child is present in Court by reason of being subject to the Juvenile and Domestic Relations Court Law, it is adjudged that he is subject to said law. He being a delinquent child in that he is found guilty of break and enter, in violation of Section 18.2-91; petit larceny, in violation of Section 18.2-96; all of the 1950 Code of Virginia, as amended.

Accordingly, it is hereby ordered that the Fifth District Court Service Unit shall, pursuant to the provisions of Sections 16.1-273 and 16.1-274 of the Code of Virginia, make an investigation and file a written report thereon which shall include the physical, mental and social conditions and personality of said Daryl Renard Adkins [sic].

And this case is continued to the 3rd day of December, 1991 at 9:00A.M. for consideration of said report and disposition of the case(s).

Entered this 22ND day of OCTOBER, 1991.

/s/ R. D. Hunter, JUDGE
R. D. HUNTER, III

ADJUDICATORY ORDER

J012744

ATKINS, DARYL
11-6-95

03-00 ROBBERY on Juvenile
9-8-95 18.2-58 Reduced to Grand Larceny 18.2-95

KLENE, DET/HPD

9-11-95

EIGHTH JUDICIAL DISTRICT, CITY OF HAMPTON
JUVENILE & DOMESTIC RELATIONS DISTRICT COURT
30 KING'S WAY
HAMPTON, VA 23669

I, THE UNDERSIGNED CLERK OR DEPUTY CLERK OF THE ABOVE-NAMED COURT, AUTHENTICATE PURSUANT TO VA. CODE § 8.01-391(C) ON THIS DATE THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE ABOVE-NAMED COURT MADE IN THE PERFORMANCE OF MY OFFICIAL DUTIES.

1-16-98 /s/ Betty Gatiwood
DATE [ ] CLERK [X] DEPUTY CLERK

/s/ Joe Stellute
Attorney A/[R]/W

OFFICE CONTACTS AND COURT PROCEEDINGS

DARYL ATKINS IP ELVIRA BULLOCK IP

9-11-95 def present w/mother and father def to remain in Secure Detention parents to employ counsel continue to 9-15-95 to check atty. LRL/PAK

9-12-95 Per Cf. Joe Stellute, retain Def atty request Detention hearing 9-15-95 pak

9-15-95 def present w/mother, father and atty Stellute def to remain in secure Detention. Ct will authorize Electronic Monitoring 10-17-95 trial date LRL/pak

10-17-95 def present w/parents and atty Stellute, CA motion to reduce charge to Grand Larceny. No objection motion granted. def offers plea of guilty. Waiver & stipulation of evidence. Ct accepts plea. Ct finds def guilty Disposition 12-08-95 LRL/pak

12-8-95 P.O. request cont to 1-12-96 pak

1-12-96 Def. present with both parents and atty. Stellute. Court does sentence defendant to 120 days in jail (may be served on the weekend) Court does fine defendant $1000.00. fine due 6-15-96

/s/ Louis R. Lerner

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-219

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-212

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-220

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-221

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-222

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-224

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-223

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-226

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Maiming (F)
CODE SECTION	:	18.2-51.2
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-209

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence as to malicious wounding and reduce on the grounds orally assigned and made a part of the stenographic record of this case, which motion to Court doth deny and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Maiming, as charged, in violation of Code Section 18.2-51.2.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-213

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-214

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION -	:	18.2-53.1
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-218

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Abduction (F)
CODE SECTION	:	18.2-48
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-217

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Abduction, as charged, in violation of Code Section 18.2-48.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-225

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-210

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Attempted Robbery (F)
CODE SECTION	:	18.2-26 & 18.2-58
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-211

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Attempted Robbery, as charged, in violation of Code Section 18.20-26 & 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR
THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA	:	CASE NO. 98-8229 (6)
VS	:	
DARYL RENARD ATKINS	:	

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the hearing in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on August 19, 1999, before the Honorable Prentis Smiley, Jr., Judge of said Court.

DOCTOR STANTON E. SAMENOW

A Yes.

[7] A I did not.

Q Thank you, sir.

Now, did you keep records of your tests of Mr. Atkins?

A Certainly.

Q And you have those, do you not?

A I do.

Q Now, you testified for the direct and direct that you have made the analysis, opinion, that Daryl was of at least average intelligence, is that correct?

A That's true.

Q Now, what test did you administer to determine that, sir?

A As I indicated yesterday, I gave portions of the Wechsler Memory Scale, the selected items of the Wechsler Adult Intelligence Scale, namely, from similarities, vocabulary and comprehension, and I also gave the Thematic Apperception Test, which in itself is not an intelligence test but it certainly does give some indication of a person's use of syntax, language, vocabulary, and these were portions. I want to underscore, and I said this yesterday, portions of those tests.

[8] Q You gave the Wechsler Memory Scale form one, is that correct?

A Yes.

Q And you only gave part of that, is that correct?

A Parts, yes, not the entire test.

Q That test was developed in 1939, was it not, Doctor?

A An old standard, yes.

Q Have there been any improvements in the tests to be administered since 1939?

A I don't know if there is another form of the Wechsler Memory Scale. This is the Wechsler-I, which simply has memory items and attention items. And that was my purpose.

Q So you're not familiar with the Wechsler Adult Scale revised, put out in 1955, you're not familiar with the Wechsler-III, put out in 1998 – not 1998, 1991?

A Well, Mr. Saunders, according to my form here, this Wechsler Memory Scale-I was renewed in 1972 by the Psychological Corporation, so this is not a 1939 or 1940s or 1950s test.

Q Doctor, do you even have the Wechsler-III?

[9] A Are you talking about memory scale?

Q I'm talking about this book right here and the tests that go with it. Do you even have this in your office?

A I don't have that in my office. I thought you were talking about earlier you started to ask me about the memory scale.

Q I asked what you administered.

A Yes.

Q And you did not administer the current state of the art tests or any portion – full portion of that test to Daryl, did you?

A Disagree. That's not true. I did, in fact, take items. I have Doctor Nelson's tests. I know what the similarity items are. I know what the vocabulary items are from the Wechsler-III. It was those items, the same items that Doctor Nelson gave that I administered.

Q You administered the full verbal substance?

A No, as I said earlier, I administered a part of similarities, vocabulary and comprehension.

Q Doctor, you administered parts of

* * *

[13] A I do. I have it here.

Q On page three, approximately halfway down the paragraph.

A Absolutely. I did ask him that.

Q And there is a query that you can ask for that particular question, isn't there?

A Yes.

Q Do you know what the query is that you're – the test says you're supposed to do?

A I don't have the booklet in front of me, but I believe you can ask the person to tell you more.

Q Tell me more about it?

A Yes.

Q But that's not what you said. You said, "How else are they alike?"

A That's absolutely right, Mr. Saunders. I wanted to know if this man knew how the two were alike.

Q All right. Now, that's not the standard practice and not the instructions –

A Absolutely not. I was interested here in what this man knew. That was critical.

Q Doctor, then, if you don't administer this test or these tests in accordance [14] with the instructions, your test results are no good, are they?

A My test results are perfectly good because the man either knows the answer or he doesn't know the answer. And this man is content with sitting there doing the least, and if you push him a little he comes up with the answer in many cases. That is what I wanted to know.

Q You pushed him a lot, didn't you, Doctor?

A I disagree with that characterization.

Q But you pushed him?

A Absolutely.

Q Every time he gave you an answer, you said, "Well, try something else," or –

A No, Mr. Saunders, I didn't say try something else. It is true I would ask him to explain it further, and in the instance that is cited in my report, I did ask how else are they alike. Again, I wanted to know what he knew.

Q Doctor, as far as the – you say you gave him the vocabulary subtest?

A Again, I gave him items from that test.

* * *

[19] THE COURT: I didn't understand what you said.

BY MR. SAUNDERS:

Q And that's probably what happened in this case, isn't it, Doctor, that Daryl got over on Doctor Nelson?

A No.

Q No?

A No, I think that what Mr. Atkins did was typical. He's asked the question. He does the minimum. He gives the minimal answer. That's it. It's consistent with his school records, doing the minimum. I come in, I asked him the questions, I push him a bit, the answers are there. He even voluntarily tells me what pi is.

Q Well, Doctor, it's been your opinion since this book was written that the criminal is solely responsible for his own conduct, correct? That's one of your basic premises of this book, is it not?

A Yes.

Q That they are so intelligent that they can fake mental insanity?

A I have said that that is certainly something that has occurred and that I have

* * *

[26] A I have gone to professional workshops. I give professional workshops in the area for forensic psychology.

Q To whom, to your peers or to police departments and correctional facility people?

A Both. To many, many mental health organizations and professionals. In fact, the American Psychological Association just called me to talk in Boston.

Q They did?

A Yes.

Q So you are a member of the APA?

A That's right.

Q And you are aware of their ethical code, are you not?

A Yes.

Q You are aware that their ethical code says that you shall use the latest tests, are you not, in your evaluations?

A When one is doing a full evaluation with testing, which I was not doing, yes.

Q Well, what were you doing, Doctor, if you weren't performing the function which this Court ordered you to do, what were you doing?

A Mr. Saunders, I was doing exactly [27] what this Court ordered me to do. Mr. Atkins had had the entire battery of tests by Doctor Nelson. I saw no purpose, indeed, I thought it would be a complete waste of time to readminister item by item all the subtests in the Wechsler-III. My objective was to understand the person that I was dealing with.

There was a question or issue of mental retardation. My decision, which I have explained, was to, among other things, administer items of the test. I wanted to know whether Mr. Atkins could answer these items rather than just do what he had been prone to do throughout his life, to do the least, to give a token answer. I wanted to know was this man retarded or wasn't he.

Q Well, Doctor, you had Doctor Nelson's raw material, you recalculated them and saw that the test scores were accurate and then, of course, you get to the adaptability part, correct?

A Right.

Q Now, whom did you talk to who had seen Mr. Atkins in the general society?

A Nobody.

Q So his adaptability test is that he can run a washing machine, is that correct?

[28] That's part of your decision that he's adaptable in society because he can run a washing machine?

A I had read that he couldn't do anything much for himself. He can wash his clothes, he can dry his clothes, he can cook. Since he was living with a parent and not self-supporting, there really wasn't much else to ask about.

Q Well, did you ask whether he could drive a car? Did you ask whether he could change bus routes on his own? Did you ask if he had a banking account, whether he could add a checking account balance?

A Well, I knew that he did not drive a car because he did not have a license. I knew that he could count money and make change, and he knew what the tip was in a restaurant because I asked him about those things.

Q Tell me, Doctor, do you have children?

A Yes.

Q How old are your children?

A They are in graduate school.

Q When did they first learn what a tip was, at what age?

A I don't remember, pretty young.

* * *

[31] A Not always. There are kids who do very well in school. In fact, there are kids who go on to college and even graduate school, do very well, but they are still committing crimes and doing irresponsible things on the side. So there are different patterns.

Q But the ones who don't do well in school, you can document that – that conduct through their school records, correct? That's one of your premises in this book, isn't it?

A Would you repeat that. I want to be sure I'm –

Q The ones that do not do well in school, all right, you can document a pattern of conduct through the school records, such as fighting, being expelled, showing that this is something that just built right on up, can't you?

A In some cases.

Q Do you see anything in the records that show that Daryl Atkins had been expelled for fighting?

A No, not that he was expelled for fighting.

Q All right. You saw a number of comments that he could do better in school?

[32] A Oh, absolutely.

Q And that was the teachers' opinion, correct?

A Yes.

Q You noticed the opinion written on his second grade card – report card when he was held back in the second grade, did you note that?

A I recall he was held back. I don't recall which comment you are speaking of.

Q I'm talking about the comment where the teacher said the third grade was too difficult for him.

A I don't recall that. I assume that was true if he was held back, that the teacher thought that, she wrote it.

Q All right, Doctor. When you're appointed to – as defense mental health expert, what's your job there?

A Are you talking about in a capital case?

Q In a capital case, yes, sir.

A Well, it's the same.

Q The same?

A Yes, to talk to the defendant and it is to try to find out if there are mitigating

* * *

[40] advantageous for an individual to be able to drive an automobile in a criminal field, wouldn't it?

A Generally.

Q And it would be in their interests to do that, wouldn't it?

A I don't know how to answer that, it depends on the person and on the situation.

Q Well, you reviewed Daryl Atkins' records, didn't you?

A He failed driver training.

Q Absolutely, didn't he?

A Yes.

Q Did you find anything in there like war stories, war classes or anything, where he actually performed any better? What classes did he perform better on? Excuse me.

A This is back in 1992 and '93 where the teacher wrote, great job in improving science, health and writing, and it showed a final grade of C in science, final grade of B in health, final grade of B in – I believe it's computers, and a final A in writing.

Q Well, Doctor, do you know what school that was in?

A This particular paper just says [41] Hampton City Schools, Buckroe School.

Q All right. Do you have the next year's grades for the tenth grade at Bethel High School?

A I'm sure I do. These seem to be – seem to be out of order here. So if you have it and can show it to me, that might save some time.

(A document was exhibited to the Commonwealth Attorney by Defense Counsel and then presented to the witness.)

THE WITNESS: Yes, his final grades here were two D's and two C's.

BY MR. SAUNDERS:

Q All right. Now, do you know what he made in the next year, what his grades were in the next year?

Do you have the accumulative grades for 1992 to 1993, '93 to '94, '94 to '95?

A I probably do, because I have the whole thing. I have up through '95-'96.

Q And what were his grades?

A A, B, C, D, C, C.

Q In what year, Doctor?

A '95-'96.

* * *

[45] THE COURT: Thank you, sir.

Mr. Hahn, any redirect?

MR. HAHN: I have a few questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. HAHN:

Q Doctor Samenow, I wish to rephrase slightly the question asked to you by Defense Counsel regarding the dangerousness of Daryl Atkins in the prison system. When he asked you what risk he would pose to society,

you said none unless he escapes. What risk would he pose to the guards and the inmates and the other personnel within that prison system?

A Well, Mr. Hahn, this man has a history of violence that predated the capital murder conviction. He has a history of violence with a firearm. He is a man who told me that he is angry all the time just at being in prison. He is a man who also told me that he thinks he has special powers in the sense that he has knowledge that is superior to other people. He has an extremely inflated view of himself.

[46] He has no remorse, or at least he expressed no remorse for anything that he had done, even denying that he had committed two crimes for which he has been convicted. So this man has not even faced up to what he's done. He sees it to be a rank injustice that he's locked up. He has a history of violence.

He's young, and he believes that he has special knowledge and, in a sense, special abilities. I think these are significant risk factors for further violence in prison.

Q Doctor, how long have you been giving IQ tests?

A Since 1964.

Q Is that 35 years?

A Yes.

Q Roughly. These few questions, or the select questions, you gave, did you use the same questions that Doctor Nelson did?

A Yes, certainly.

Q I mean, you had his questions?

A Yes.

Q And you used those?

A Absolutely.

Q All right. Did you base your [47] opinion on the Defendant's intellect solely upon the results of his tests that you gave him during your interviews?

A Absolutely not.

Q What else did you rely on?

A Well, as I testified yesterday, this man had knowledge of current events, knew who the governor of the State of Virginia is. He knew correctly the year that John Kennedy – John Kennedy was president, 1961. I cited many examples of words that he used correctly in syntax: Parable, decimal, reciprocal fractions, orchestra. I also cited that he could put together stories with cause, effect, past, present, and future. And so – and he also talked freely, developed ideas, concepts.

I didn't have the same experience Doctor Nelson did, apparently, according to his report, where the Defendant was hard to get answers from him. In fact, at the conclusion of the second interview, I had to terminate the interview because Mr. Atkins was talking extremely freely, and we had to get out of that room because it was scheduled for another purpose. So he was extremely verbal.

Q Defense Counsel also asked you about did you see any pattern of expulsions or [48] anything in the school records, and you said no. Did you see any other type of pattern in his school records?

A Well, there were observations. And there were suspensions. There was skipping class and there was loitering, many tardies, but really, the issue that I think is most germane is not that. But it has to do with the school record that is replete with examples of how little motivated he was, how little incentive there was to do what was being asked of him.

The teacher comments overwhelmingly have to do with attitude, motivation, lack of application, not ability. In fact, I cited the statement, you can do better, or Daryl can do better, as an example of where a teacher had concluded that Daryl Atkins was not working up to what he could. So it wasn't a matter of a lack of ability. It was a matter of a lack of performance.

MR. HAHN: I have no further questions.

THE COURT: All right. Thank you. Any recross?

MR. SAUNDERS: Short, your Honor. Short.

* * *

Virginia Department of Corrections

Presentence Investigation Report

Offender Information

District Number P34

Date of Sentencing October 26, 1999

Prepared By Pamela W. Dickerson

Date Prepared October 18, 1999

OFFENDER SUMMARY

Offender's Name (Last, First, Middle)
ATKINS, DARYL RENARD

Nickname/Street Name Daryl, "D"

Alias (AKA) N/A

Maiden Name N/A

Race	Sex
Black	Male

Place of Birth (City or County)	LOC/	State
Hampton	650	VA

Age	Date of Birth
21	11/06/1977

Social Security Number 223-47-0073

State ID Number (CCRE) VA1045218T

FBI Number 109074DB6

Permanent Address VA Dept. of Corrections,

Local Address (if different)

COURT INFORMATION

Court	Judge
YORK	Honorable Prentis Smiley Jr

Prosecuting Attorney Addison, E./Hahn, B.

Defense Attorney Rogers, G./Saunders, B

Type of Counsel
[✓] Court Apponted [ ] Retained

Date of Conviction 02/13/1998

Method of Adjudication
[ ] Guilty Plea [ ] Judge [✓] Jury

Pretrial Status
[ ] On Bond [ ] Own Recognizance
[✓] Confinement [ ] Third Party Release
[ ] Confined on Other Charge

Source of Bond
[ ] Personal [ ] Family [ ] Other [ ] Bondsman
[✓] N/A

Post Trial Status
[ ] Not Confined
[✓] Confined

Pretrial Jail Status
From: 08/21/1996 To: 02/26/1999

OFFENSE INFORMATION

	Docket Number	Offense at Indictment
1.	CR96-8229-01	MURDER Capital Robbery or attempted robbery

Offense Code (VCC)	Plea Per Offense
MUR0933F1	Not Guilty

Offense at Conviction	Offense Code (VCC)
1. MURDER Capital Robbery or attempted robbery	MUR0933F1

Plea Agreement	Virginia Code Section
No	18.2-31(4)

CODEFENDANTS

Names (Last, First, Middle)	Disposition
1. Jones, William A	First Degree Murder & Use of F/A: Sentenced on 2/26/98 to Life plus 5 years

MOST SERIOUS OFFENSE INFORMATION

Most Serious Offense at Indictment
MURDER Capital Robbery or attempted robbery

Offense Code (VCC)
MUR0933F1

Offense Date 08/17/1996

No. of Co-Defendants 1

Resisting Arrest Charge No

Type of Offense
[✓] Person [ ] Property [ ] Other

Legal Status at the Time of Offense
(Check all that apply)
[ ] Escaped [ ] Inmate [ ] Mandatory Parole [ ] Discretionary

Parol [ ] Probation [ ] On Bond [ ] Summons [ ] Released on Recognizance [ ] Post-Release [ ] Community Program [ ] Good Behavior [ ] Unsupervised Probation [ ] Juvenile Probation [ ] Missing/ Unknown [✓] Other [ ] None

Weapon Use
[ ] None [✓] Used to Injure [ ] Used To Threaten [ ] Possession

Weapon Type
[✓] Firearm [ ] Knife [ ] Explosive [ ] Simulated Weapon [ ] Other [ ] N/A

Offender's Role in Offense
[ ] Alone [✓] Leader [ ] Accomplice [ ] Not Determined

Current Arrest Date 08/21/1996

MOST SERIOUS OFFENSE VICTIM INFORMATION (CRIME AGAINST PERSON)

Injury to Victim
[✓] Death [ ] Serious Physical [ ] Physical [ ] Emotional [ ] Threatened [ ] N/A

Victim Relationship to Offender
[✓] None [ ] Friend [ ] Family [ ] Police Officer

Physically Handicapped Victim
No

Victim Information
Sex M Race White Age 21

Victim Impact Statement Requested
If Yes, Attach to Last page of PSI
Yes

Alcohol/Drug Use At time of Offense
[ ] None [✓] Both [ ] Alcohol
[ ] Drug [ ] Unknown

Drug Offense
Primary Drug N/A Secondary Drug N/A
Amount Amount

Narrative of Current Offense

COMMONWEALTH'S VERSION

Reports from the Commonwealth's Attorney's file revealed the following information concerning the present offense:

On August 16, 1996, Airman Eric Michael Nesbitt, age 21, left his part-time job at Advance Auto in the City of Hampton, Virginia sometime between 11:00 P.M. and 11:30 P.M. to return to his residence on Langley Air Force Base. On the way home he stopped at the 7-Eleven Store located on Armistead Avenue near Butler Farm Road, in the City of Hampton. While at this location the Defendant, Daryl Renard Atkins, and Codefendant, William Alfredrick Jones, entered Nesbitt's vehicle and abducted him at gun point. Nesbitt was driven to the Crestar Bank branch located at Coliseum Crossing, in the City of Hampton. On August 17, 1996, at 12:16 A.M., $200 was withdrawn from Nesbitt's account using the ATM. Bank security cameras captured Nesbitt seated between Jones and Atkins. Jones was driving Nesbitt's pickup truck, and Atkins was seated on the opposite side of Nesbitt (nearest the passenger door) with what appeared to be a firearm in his hand.

After leaving the Crestar Bank, Nesbitt was driven to an isolated location on Crawford Road in York County, Virginia where he was shot eight times with a .380 caliber handgun. Nesbitt's dead body was discovered at 4:45 A.M. on August 17, 1996, on Crawford Road.

Photographs of Nesbitt accompanied by Atkins and Jones, were distributed to the news media and Crime Line. Various responses from the community identified Atkins and Jones, and promising leads were developed. Atkins was arrested on August 21, 1996, at his father's residence in the City of Hampton. He was recovering from two gunshot wounds to his left ankle, sustained in the commission of this crime. Jones was arrested on August 22, 1996, at room 578 of the King James Hotel located in the City of Newport News, Virginia. Nesbitt's vehicle had been recovered from this location the previous day.

OFFENDERS VERSION

The following version was taken from the presentence report completed April 15, 1998 by Probation and Parole Officer Dale Jacobson for the York County Circuit Court:

Daryl Atkins advised that around 11:00 A.M. on the morning preceding the offense he and the co-defendant – William Jones, began consuming Gin whiskey mixed with juice, bottles of forty ounce "Blue Bull" malt liquor, and smoking marijuana laced with cocaine. This was at his (Atkins') residence; 1 Sacramento Drive, Apartment 89, in the City of Hampton. At around 5:00 P.M. that same day a friend "Ahad" came over. Ahad also shared in the drinking and smoking. Ahad had a vehicle and he drove Atkins, Jones, and another individual; Mark Dallas, to the

Alcohol Beverage Control (ABC) store. Atkins did not elaborate on what time Dallas originally arrived. He did state that by the time the foursome went to the ABC store, he and Jones had already consumed a large quantity of alcohol and drugs. Leaving the ABC store, Ahad dropped off Atkins, Jones, and Dallas back at Atkins' residence. This was around 8:00 P.M. The remaining threesome continued to consume alcohol; sharing approximately one more pint of Gin and juice. At this point, Dallas advised that he needed to quit drinking in order to be able to go to work the following morning for his first day on the job at Burger King. Although he quit drinking, Dallas stayed at Atkins' residence a while longer. During this time, Atkins and Jones continued to consume alcohol.

Eventually Dallas stated he was ready to go home. Jones then asked Dallas if he could use his handgun. Because Dallas lived so close to Atkins, he went home, returned with the weapon, and handed it to Jones. Dallas then left again and did not return. Atkins and Jones proceeded to consume another pint of Gin and juice. Around midnight, Atkins and Jones ran out of alcohol and drugs. According to Atkins, he alone had consumed around $30 to $50 dollars [sic] worth of marijuana, $10 worth of cocaine, $50 worth of Gin and juice, and 5 or 6 bottles of forty ounce malt liquor.

White [sic] Atkins never asked Jones why he had Dallas' handgun, he felt he knew what Jones had in mind. The two decided to walk to the nearby 7-Eleven. Jones indicated he was going to rob someone to get more alcohol. Atkins offered to go along. Atkins then described to Jones how they could go about obtaining a victim for a robbery. Atkins explained that Jones should wave or holler at the

potential victim in order to get him or her to stop. Jones should then approach the victim and only when close enough should he produce the weapon.

Upon arriving at the 7-Eleven, Atkins and Jones waited off to the side of the building until they saw Eric Nesbitt pull into the parking lot. They waited for him to exit the 7-Eleven and enter his pickup truck. Jones then approached Nesbitt from the driver's side of the vehicle and asked if he (Nesbitt) had any, or knew where to get any weed (marijuana). When Nesbitt paused to respond, Jones produced the handgun, instructed Nesbitt to slide over to the middle of the truck, and instructed Atkins to get in the passenger side of the vehicle. Jones then handed the weapon to Atkins and drove the vehicle out of the parking lot.

At this time Atkins told Nesbitt to produce his wallet. Nesbitt handed it to Atkins, and Atkins removed $60 dollars [sic] which he in turn handed to Jones. Nesbitt then advised that he could get more money via his automatic teller machine (ATM) card. At some point early in the abduction and robbery, Jones drove the truck into a parked car. This caused damage to the driver's side door of the truck, but Atkins does not believe that it affected the ability of the door to open. Jones then drove the truck to the Crestar Bank ATM located at Coliseum Crossing. There, Atkins held the weapon on Nesbitt, while Nesbitt reached across Jones to complete the ATM transaction. This produced an additional $200. The money and Nesbitt's wallet were all held by Jones.

At this time Jones debated aloud what he should do with Nesbitt. Atkins remembers Nesbitt stating he knew a

place where they could take him that would be impossible to return from in under two days. Jones then stated he knew a place where he could take Nesbitt and tie him up. Jones then drove toward Interstate 64 and traveled west until he exited at Lee Hall. He then traveled east on Route 238 (Old Williamsburg Road) until he turned onto Crawford Road. Atkins never knew where they were going.

During the trip up the interstate, along Old Williamsburg Road, and onto Crawford Road, Atkins remembers rock and roll music playing in the truck. He further remembers Nesbitt reaching behind himself to a container behind the seat which held cassettes or compact disks. Nesbitt is said to have changed the music at least once. Also during this time very little was said by anyone in the truck. Atkins remembers telling Nesbitt that he wasn't going to hurt him, and he remembers Jones asking Nesbitt if he had a wife or any children.

Driving along Crawford Road, Jones stopped the truck where Tower Road intersects from the left. At this juncture, Jones told Atkins to return the weapon and then for both Atkins and Nesbitt to get out and switch places upon re-entry. Atkins handed the weapon back to Jones, and then both Atkins and Nesbitt complied with the second instruction. Jones, at this point placed the weapon in a left side holster, and backed the truck up about two hundred feet. Jones then took the weapon out of the holster and ordered Nesbitt to reach across both Atkins and himself to open the driver's door. To do this, Nesbitt had to use both hands; one hand to operate the lock which was just below shoulder height toward the back of the door, and one hand to pull open the handle of the

door. During this time, Jones was holding the weapon in his left hand and pointing it at Nesbitt.

Jones exited the vehicle and instructed Nesbitt to do likewise from the passenger side. Atkins was attempting to follow Nesbitt when Jones appeared on the passenger side of the vehicle in front of Nesbitt. Nesbitt crouched down. Jones ordered Nesbitt to stand up, and then immediately began firing the handgun at Nesbitt. One of the bullets struck Atkins in the leg, Nesbitt fell to the ground just outside of the truck. Jones then returned to the driver's side of the truck and got in.

While driving away from the scene of the murder, Atkins told Jones that he had been shot and that he needed to go to the hospital. Jones, at first, declined. Atkins promised he wouldn't tell anyone how he had been shot, and Jones did eventually drive him to the hospital. While en route to the hospital, Atkins advised Jones that he would need transportation money from the hospital. Jones gave Atkins $20, and dropped him off at Riverside Hospital in Newport News, Virginia. Atkins advised the hospital security officer that he had been robbed and shot at Deer Park, and that he had hopped on one leg all the way to the hospital. Atkins denies ever making any statement to any hospital nurse.

CO-DEFENDANT'S VERSION (as stated in William Jones' presentence investigation report)

William Jones advised that on August 16, 1996, he had met with Atkins and the two began drinking alcoholic beverages and smoking marijuana beginning at 11:00 A.M. He indicated that he had consumed six or seven 40-ounce beers and two bottles of gin mix beverage.

He advised that he had known Atkins for approximately two months before the offense. Jones reports that there were several other friends drinking with him and Atkins but towards the end of the evening the other people left. Jones reports that Atkins went to the apartment of an associate and borrowed a gun for his own protection. Atkins and Jones decided to walk to the 7-Eleven to purchase some more beer. After arriving at the 7-Eleven, Jones claims that Atkins advised him that he did not have enough money to purchase any beer and would have to "panhandle." After being at the 7-Eleven for a short while Jones claims that Nesbitt pulled up in his pickup truck and entered the store. Jones claims that on the way in Atkins asked Nesbitt for some money but was not sure of Nesbitt's response. Nesbitt left the 7-Eleven store a short time later and entered his pickup truck. As he was backing out of the parking lot Atkins whistled and Nesbitt stopped. He claims that Atkins entered the passenger's side of the pickup truck with his firearm and motioned for Jones to enter the vehicle and drive. After Jones entered the pickup truck he began to drive on Armistead Avenue. Jones claims that Nesbitt provided $20 but when told this was not enough money, he advised that he had an ATM card from Crestar Bank. At this time they drove to Crestar Bank and withdrew $200. After the money was withdrawn Jones claims that he asked Atkins what he planned to do with Nesbitt. According to Jones, Atkins advised him that they were going to drive him to York County and tie him up. Jones drove the vehicle to Crawford Road and stopped when told to do so by Atkins. At this time Atkins departed the truck with Nesbitt and began firing the weapon at him. Jones claimed that he

jumped out of the truck and began wrestling with Atkins for the gun. During the struggle the gun discharged and Atkins was shot in the leg.

Juvenile Criminal History

JUVENILE RECORD
Prior Juvenile Record Yes

Type of Record
[✓] Delinquent [ ] Status [ ] Both

Age at First Juvenile Delinquent Adjudication
14

Number Prior Juvenile Delinquent Adjudications
Crimes Against Person 2
Crimes Against Property 2
Drug Crimes 0 Other 0

Type of Disposition(s)
[✓] Probation [ ] Revoked
[ ] State Ward [✓] Other

Verified Information Yes

Source of Information if Unverified
[ ] Family Member [ ] Defendant [ ] Other

Narrative of Juvenile Criminal History

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

On January 22, 1992, in the Juvenile and Domestic Relations Court for the City of Suffolk, Virginia, Daryl Renard Atkins, then age 14, was adjudicated delinquent for having committed the crimes of Break and Enter, and Petit

Larceny. He was placed on supervised probation, ordered to pay $50 restitution, and attend a program known as Straight Talk. His supervision was immediately transferred to the City of Hampton. The following year he was released successfully from probation

On September 8, 1995, in the City of Hampton, Atkins, then age 17, along with two other individuals approached Aaron Griffith and Michael Consentino in the woods behind Bethel High School. Atkins asked Griffith for his money and received five dollars. The other two individuals took clothes, money, and watches from Consentino.

In the course of the 1996 pre-disposition report Atkins advised having previously robbed someone, but that the Griffith robbery was unplanned. During the 1998 interview with Dale Jacobson, for the purposes of the presentence report related to the instant offense, Atkins advised having been involved in approximately five robberies as a juvenile, always without a firearm, and always as a follower.

On January 12, 1996, in the Juvenile and Domestic Relations Court for the City of Hampton, Virginia, Atkins, then age 18, was adjudicated delinquent for having committed the crimes of Grand Larceny from Person (two counts). This adjudication reduced the charges which were originally two counts of Robbery. Atkins was ordered to serve 120 days in jail (to be served on weekends, if possible), and given a fine of $1,000.

Still in 1996, but after having been arrested by authorities for the City of Hampton, and York County, Atkins was returned to court in light of his failure to serve all of his

jail sentenced [sic]. The matter was nolle prossed on motion of the Commonwealth on October 7, 1996.

This information was shared with Ms. Bullock (Defendant's mother) who stated her agreement.

Adult Criminal History Summary

ADULT RECORD
Prior Adult Record Yes

No. of Prior Felony Sentence Events 2

No. Prior Felony Convictions For:

Crimes Against Person	Property Crimes	Drug Crimes	Other
10	2	0	11

No. of Prior Felony Convictions For Instant Offense at Conviction
0

No. of Previous Felon Commitments
Virginia 2 Out-of-State 0

Most Recent and Serious Prior Criminal Adult Convictions

	Description		Offense Code (VCC)
1.	KIDNAPPING Pecuniary Benefit Extortion, abduct wit	1.	KID1012F2
2.	ASSAULT Malicious Wounding Stab, cut, wound w/mali	2.	ASL1336F2
3.		3.	
4.		4.	

5. _____ 5. _____

No. of Prior Probations
Completed 0 Revoked 0

No. of Prior Paroles
Completed 0 Revoked 0

No. of Prior Incarcerations Received
Under One Year 0 One Year or More 11

Last Previous Arrest Date
(Or Release From Confinement)
09/08/1995

No. Prior Misdemeanant Convictions
Criminal 0 Criminal Traffic 0

Narrative of Adult Criminal History Summary

On February 9, 1998, Daryl Atkins pled guilty to Robbery, Abduction and 2 counts of Using a Firearm during the Commission of a Felony in the York County Circuit Court. He pled not guilty to Capital Murder and one count of Use of Firearm. On February 13, 1998, he was found guilty of those charges by a jury. He was sentenced on April 28, 1998 to the Death Penalty for the Capital Murder and sentenced to Life in prison for the Abduction and Robbery. He received 5 years in prison on each of the three counts of Using a Firearm. On February 26, 1999, by order of the Supreme Court of Virginia, the Capital Murder conviction of February 13, 1998 was affirmed, although the sentence of death was reversed and annulled, and remanded back to the York County Circuit Court for a new sentencing trial. On August 19, 1999, a jury again sentenced him to the Death Penalty for Capital Murder which is the subject of this report.

The following information regarding Daryl Atkins prior adult criminal history is taken from the April 1998 presentence report prepared for the York County Circuit Court:

Nearly all of Daryl Atkins' adult criminal history involves violence or the threat of violence. In all but one of his previous episodes of documented adult criminal activity a handgun played a role. Substance abuse appears to have played a role as well.

In discussing his adult criminal history with Dale Jacobson, Daryl Atkins denied any involvement in the crimes against Shane Stoops and Amanda Hamlin, but did admit his guilt in the crimes against Shavonda York and Kevin Phillips. In the York case he offered the name of William Jones as his codefendant. In the Phillips case he continued to withhold the names of his codefendants.

What follows are narratives of Atkins' offenses described in the May 1997, presentence investigation report completed by Probation and Parole Officer Mary Knight for the Hampton Circuit Court:

Robbery, Abduction, Use of a Firearm in the Commission of a Felony (2 counts)

On June 28, 1996, Kevin Phillips was making a Chanellos Pizza delivery to 30 Sacramento Drive in the City of Hampton. As he drove up the house was dark, but he saw a black male coming from the house waving to him. Phillips approached the man, who was standing between the door and the screen. As he got closer, three other black men came from around the side of the house. These three men were all wearing masks. Two of these men

went to the car and one put a gun to Phillips' head. The unmasked man stood behind Phillips and went through his pockets. Phillips' wallet, $20 of store money, and about $6 in change was taken.

Corporal Browning of the Hampton City Police questioned Atkins about several Hampton offenses. Atkins acknowledged his participation in this case stating he was the man without the mask. When Probation and Parole Officer Jacobson questioned him about his codefendants, Atkins again chose to remain silent.

Break and Enter, Grand Larceny

Shavonda York left her town home at 6 Carmine Place in the City of Hampton at approximately 6:00 A.M. on June 4, 1996. When she arrived home at 5:00 P.M., she discovered that criminal entry had been gained via breaking the latch on a rear kitchen window. Property taken included a television, VCR, leather coat, and jewelry (gold watch and a ring with the initial "I").

Corporal Browning of the Hampton City Police questioned Atkins about several Hampton offenses. Atkins acknowledged his participation in this case stating he and William Jones broke a latch on a back window at a town home near Machan School. Atkins further admitted taking all of the above mentioned items as well as a class ring. When Probation and Parole Officer Jacobson questioned Atkins as to why he was willing to advise law enforcement of Jones' participation in a Break and Enter, and Grand Larceny case, but not to divulge the names of his codefendants in a Robbery, and Abduction case, Atkins declined to respond.

Robbery (4 counts), Use of a Firearm in the Commission of a Felony (4 counts)

Shane Stoops, Scott Thompson, Dennis Tuinei, and John Hultquist were out celebrating Stoops' 21st birthday. Sometime after midnight on April 29, 1996, they were in Hultquist's automobile and decided to call an escort service. Hultquist and Thompson dropped off Stoops and Tuinei at a pay telephone in front of Almost A Bank at 902 West Mercury Boulevard, in the City of Hampton. Hultquist and Thompson then drove to a cash machine. When they returned, Tuinei was still talking on the telephone. All four men were standing around the telephone when three black males approached. Tuinei hung up the telephone and the original four men started to get back into Hultquist's automobile when one black male said, "Nobody move." Another black male (not the defendant) had a handgun. The victims were told to empty their pockets and get on the ground. The victims were all robbed of money and wallets. Detective Burton of the Hampton City Police prepared a "photo spread" and showed it to the victims. All four identified Atkins.

Aggravated Maiming, Attempted Robbery, Use of a Firearm in the Commission of a Felony (2 counts)

On August 9, 1996, at approximately 8:00 P.M., Amanda Hamlin finished mowing her lawn at her home at 934 Aberdeen Road, in the City of Hampton. She was approached by a man wearing a handkerchief on his face, and carrying a handgun. The man instructed her to lay down, then proceeded to drag her by the arm to the front of the house. He hit her with the gun, asked her who was in the house, and although her teenage daughter was

home, she answered, "no one." Atkins then shot her in the stomach and ran across Aberdeen Road and got into an Acura. Hamlin was taken to Riverside Hospital where she had surgery to resect her bowel. The bullet could not be removed. She was not released from the hospital until August 31, 1996. Corporal Browning of the Hampton City Police interviewed Atkins about this crime. According to Browning, Atkins admitted this crime, stating he was trying to rob Hamlin. Atkins advised Probation and Parole Officer Jacobson that Browning tricked him into confessing by telling him (Atkins) that if he didn't admit guilt he would be charged with the offense, but if he did admit guilt he wouldn't be charged.

Atkins has been incarcerated since his arrest on August 21, 1996. He was sent to Mecklenburg Correctional Center on April 28, 1998 and to Sussex I State Prison on August 3, 1998, where he currently remains. According to the Subject's counselor at the prison, he has had 4 disciplinary actions, 3 of which were dismissed. On June 4, 1999, he was sited for disobeying a direct order and received a 30 day loss of commissary privileges.

Family/Environmental Information

MARITAL/RESIDENTIAL STABILITY

Number of Dependents 0

Marital Status
[✓] Single/Never Married [ ] Married
[ ] Separated [ ] Divorced [ ] Widowed
[ ] Divorced/Remarried [ ] Widowed/Remarried
[ ] Other

Living Status
[ ] Alone [ ] Single Parent/Head of House
[ ] With Spouse [✓] With Parents/Other Relative
[ ] Other

Length of Residence at Current Address
Years 0 Months 3

Length of Residence in Local Area
Years 18 Months 10

Length of Residence Apart from Parents
Years 0 Months 0

Has Any Member of Offender's Family Ever Been Convicted of a Felony?
Yes

Spouse Name/Address
N/A

Narrative of Family/Environmental Information

A 1997 presentence investigation report written for the Hampton Circuit Court indicates the following:

Father: Philip Atkins, Jr., – age 48. He now resides at 189 Pine Chapel Road in the city of Hampton. He is a high school graduate and a twenty-eight year employee of the Newport News Shipyard, as a sheet metal worker. He is believed to be free of substance abuse or any criminal record.

Mother: Elvira Bullock – age 44. She resides at 217 Ridge Wood Drive in the city of Hampton. She too is a high school graduate, and has a record of twenty-one years service with C&P Telephone. Furthermore, she is also believed to be free of substance abuse or any criminal record.

Step-Father: Michael Bullock, Sr. – age 45. He brought two children of his own to this union with the Defendant's mother. His son, Michael Jr., died in 1994, at age 17, due to an asthma attack. His daughter, Tracy, is married with children and living in Chesapeake, Virginia.

Daryl Atkins' natural parents separated in 1985, and were divorced one year later. In 1989 his mother re-married. According to a 1996 pre-dispositional report written for the Hampton Juvenile & Domestic Relations Court, he enjoyed a good relationship with both his natural father and step-father, and was respectful to his mother for most of his childhood. During his last year at home he began to place a greater emphasis on acceptance by his friends. His relationship with his mother, at this time, deteriorated. His use of illegal drugs became apparent to her as well. Lastly, his step-father was incarcerated. Only a few months prior to the instant offense he moved in with his natural father at 1 Sacramento Drive; number 89, in the city of Hampton. While living at his father's residence, he continued to consume illegal drugs and alcohol, did not work, and continued to place his friends over family.

Ms. Bullock, in a telephone conversation with Dale Jacobson on March 26, 1998, indicated her agreement with all of the above except for information specific to activities at her ex-husband's residence, of which she is without first hand knowledge.

Offender Personal History

EDUCATION

Highest Education Achievement Years
11 Years

Name/Location of Last School Attended
Bethel High School,
1067 Big Bethel Road,
Hampton, VA 23666, (757) 825-4400

Education Narrative

The following information is taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins dropped out of Bethel High School in the spring of 1996, while enrolled in the twelfth grade. At that time he was academically ranked 347 out of a class of 371 with a 1.26 grade point average. He had previously failed and repeated both the second and tenth grades. According to a Hampton Circuit Court presentence investigation report prepared in April of 1997, Daryl Atkins indicated he dropped out of school because he "was involved with drugs, hanging around with the wrong crowd, and not interested in school."

He was placed in special programs for assistance in passing the Literacy Passport sub-tests for reading and math.

While it appears that he was, throughout his high school tenure, enrolled in sixteen courses that had no grade point average (GPA) weight, he was also in ten courses with a GPA weight considered as basic, nineteen courses with a GPA equal to average, and two courses with a GPA consideration of College Prep/Honors. Specific programs

made available to Daryl Atkins through the Hampton City Public School system were Beachside, and Bridges. It is the latter program which is credited with helping him to advance to the twelfth grade. Furthermore, he was near graduation when he dropped out of school. It is reported that he was easily distracted, had a short attention span in school, and was a slow learner.

MILITARY HISTORY

N/A

Current Military Status
[ ] None [ ] Reserve [ ] Active

Length of Service
Years Months

Dates of Service
To

Type of Discharge
[ ] Honorable [ ] Medical [ ] General
[ ] Undesirable [ ] Bad Conduct [ ] Dishonorable
[ ] Member at Time of Offense [ ] None
[ ] Unknown

Military History Narrative

SOCIAL/RELIGIOUS ACTIVITIES

Social Activities
[ ] None Specified [ ] Constructive
[✓] NonConstructive

Religion
[ ] Active [✓] Inactive [ ] None

Religious Preference
[✓] Protestant [ ] Catholic [ ] Jewish [ ] Other
[ ] Moslem [ ] Muslin [ ] Unknown [ ] No Preference

Social/Religious Activities Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins claims to have previously been a member of the Morning Star Baptist Church in Hampton, Virginia. He had not however, attended services for some time prior to his incarceration. In the months prior to his incarceration he was heavily involved in street drug and alcohol use. Ms. Bullock advised that her son attended church services and Sunday school on a regular basis until the spring of 1996.

Offender Personal History Continued

EMPLOYMENT HISTORY

Employment at Time of Offense
[ ] full time [ ] Part Time [ ] Full Time Student
[ ] Housewife [ ] Retired/Disabled
[✓] Unemployed

Type of Employment
[ ] Skilled [ ] Semi-Skilled [ ] Unskilled
[ ] Student [ ] N/A

Description of Occupation
UNEMPLOYED

Occupation Code 904

Length of Longest Employment
Years 0 Months 0 [ ] N/A

Longest Employment Period Within Past Two Years
Years 0 Months 0

Employment Record Over Past Two Years
[ ] Regular, Few Changes [ ] Regular, Many Changes [ ] Irregular [ ] Odd Jobs Only [✓] No Work Record

Employment History Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins has never been employed. According to the 1996 pre-dispositional report authored by Juvenile Probation Officer Anita Manley, Daryl Atkins, at age 18, stated that he was not yet ready to work, but that he would go to work once he knew he was ready.

Daryl Atkins advised Probation and Parole Officer Dale Jacobson that he does not remember ever making such a statement to anyone. He admitted that his mother often asked him to find a job but he generally just walked away without answering. When asked by his father if he was going to find a job he would generally say that he was looking for work simply as a means of ending the inquiry. He claimed that during the time he lived with his father he was receiving an allowance of $20 per week

FINANCIAL STATUS

Residence
[ ] Owner [ ] Rent [✓] Other

Checking Account No

Savings Account No

Gross Monthly Income Claimed $40.00

Total Indebtedness Claimed
$6,881.13

Total Monthly Payments Claimed $0.00

Source(s) of Subsistence
[ ] Job [ ] Public Assistance [ ] Spouse [✓] Family [ ] Other [ ] None

Financial Status Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins became an adult on November 6, 1995. Between then and the date of his arrest for the instant offense it appears he was supported either by family or from what he obtained via crimes he committed in Hampton.

His debts also appear to be the consequence of his criminal activity in Hampton. On May 1, 1997, he was ordered to pay a total of $6,881.13 in combined restitution to three victims. Costs of prosecution were also ordered but the exact amount is unknown as of this writing.

Offender Personal History Continued

HEALTH INFORMATION

Physical Health Condition
[✓] Good [ ] Fair [ ] Poor

Physical Handicaps No

Mental Health Treatment No

Mental Health Commitment No

Type(s) of Mental Health Treatment
[ ] In-Patient [ ] Out-Patient [✓] N/A

Type(s) of Mental Health Committment
[ ] Involuntary [ ] Court-Ordered Evaluation
[ ] Voluntary [✓] N/A

Drug Use Claimed
[ ] None Used [✓] Heavy Use [ ] Moderate Use
[ ] Occasional Use [ ] Extent Unknown

Drug Abuse Apparent Yes

Drug Treatment No

Types of Substances Claimed
[ ] Not Used [✓] Hallucinogens [ ] Heroin
[ ] Opium [✓] Cocaine [ ] Synthetic Narcotics
[✓] Marijuana [ ] Amphetamiens
[ ] Barbiturates [ ] Type Unknown [ ] N/A

Alcohol Use Claimed
[ ] Not Used [✓] Heavy Use [ ] Moderate use
[ ] Occasional Use [ ] Extent Unknown

Alcohol Abuse Apparent Yes

Alcohol Treatment No

Height
5 Ft. 5 In.

Weight
155 lbs.

Color Eyes
[ ] Black [ ] Blue [✓] Brown [ ] Green
[ ] Grey [ ] Hazel [ ] Mismatched [ ] Pink

Color Hair
[ ] Auburn [ ] Bald [✓] Black [ ] Blond
[ ] Brown [ ] Grey [ ] Other [ ] Red
[ ] Sandy [ ] White

Scars, Marks, Tattoos

Birth mark on upper back; tattoo of "D" on right arm; bullet wound scars on lower left leg

Health Information Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins is asthmatic. It is known that his step-brother, Michael Bullock died at age 17 due to an asthma attack. He and his step-brother were reportedly close. Atkins also received a gunshot in the leg during the course of the Instant Offense.

Atkins first began using alcohol in the ninth grade. This soon progressed to marijuana and then to cocaine. He further admitted to Probation and Parole Officer Jacobson that he has used "acid" on at least five occasions both as a juvenile and as an adult. His drugs of choice however were cocaine and marijuana, and he would often use the two together. During all of 1996, prior to his arrest for the

instant offense, his use of cocaine averaged about twice per week while he was using marijuana and alcohol daily. While not realizing at the time that he had developed a chemical dependency, he has since determined that he could have benefited from counseling.

Regarding Atkins' mental state it is unknown if he suffered from any impairment prior to incarceration not now linked to use/abuse of alcohol and illegal drugs. Since being incarcerated, he advised being depressed, though not so much recently as during the early months in jail. In a conversation with Probation and Parole Officer Dale Jacobson on March 8, 1998, when asked to elaborate on his depression, he described what Jacobson inferred to be boredom with the structure and routine of incarceration. He spoke of having nothing to do, and of not worrying about the past because it cannot be changed. He did not however elaborate on any associated feelings. His affect was flat during the whole of the interview, including during his description of the instant offense. He was resigned to the sentence recommended by his Jury. At the conclusion of the interview he stated he was sorry for what had happened to the victim and wished now that things had happened differently on the day preceding the offense. It should be remembered that he and Jones had been drinking heavily during the hours prior to the instant offense. According to Atkins, the two had also been using cocaine and marijuana during this same time period.

Atkins was tested by Clinical Psychologist Evan Nelson, and shown to have an Intelligence Quotient (IQ) of 59, which he states is within the range of Mild Mental Retardation. His school records reveal that he was a poor

student (note his GPA, class ranking, two failed grades, alternative programs such as Beachside, and Bridges, and placement in remedial courses at Bethel High School). He did however, pass the Literacy Passport sub-tests on reading and math, and was in the twelfth grade, approaching graduation, when he dropped out of school.

Community Supervision Plan & Summary

COMMUNITY SUPERVISION PLAN

Residence Plan

[ ] Alone [ ] Parents [ ] Spouse [ ] Spouse/ Dependent [ ] Other Relative [ ] Employer [✓] Other

Residence

Name	VA Dept of Corrections
Address	Administrative Office 6900 Atmore Drive Richmond, VA 23692
Telephone	(804) 674-3000

Employment

Name	N/A
Address	
Telephone	None

Offender's Plan of Restitution
Daryl Atkins is serving a three life sentences, plus 121 years in prison for convictions suspended in the Hampton and York County Circuit Courts. Therefore, no restitution payment plan was discussed.

Offender's Community Plan to Help Self
Information contained in the 1997 presentence investigaton [sic] report indicated Daryl Atkins was seeking counseling for depression and chemical dependency. He previously stated that he spends time each day reading the Bible.

Community Resource Proposed for Offender Assistance
Daryl Atkins should avail himself to counseling offered by the Virginia Department of Corrections. Additionally, he is recommended to speak with representatives of any of the vaious [sic] religious organizations which regularly visit Virginia Corectional [sic] facilties.

Recommendation
[ ] Probation [ ] Community Plan [ ] Incarceration
[ ] Other [✓] No Recommendation

Recommendation Summary

Daryl Renard Atkins is a 21 year old male who now stands before the Court for formal sentencing after having been found guilty of Capital Murder by a jury, with a recommendation for the Death Penalty. Daryl Atkins has been previously sentenced for Abduction, Robbery and three counts of Using a Firearm during the Commission of a Felony, all of which occurred during the Instant Offense. Based on the aggravated nature of these offenses committed against the victim, Eric Nesbitt, this Officer

would defer to the judgement and wisdom of the jury for sentencing.

There are no Sentencing Guidelines for the offense of Capital Murder.

/s/ Pamela W. Dickerson
Probation & Parole Officer
Pamela W. Dickerson

Criminal History Attachment

[redacted]	Offender's Name (Last, First, Middle) ATKINS, DARYL RENARD		
FBI Number 109074DB6	**State ID Number (CCRE)** VA1045218T		**Local P.D. Number**
Race Black	**Sex** Male	**Date of Birth** 11/06/1977	**Social Security Number** 223-47-0073

Criminal History Narrative

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
	JUVENILE RECORD				
01/22/1992 (S)	Suffolk JDRC	1) Break and Enter	Same	01/22/1992	1) Supervised probation for an indeterminate period, $50 restitution, Straight Talk program.
		2) Petit Larceny	Same	01/22/1992	2) Same
	Suffolk	RELEASED FROM PROBATION BY SUFFOLK COURT SERVICES UNIT			
09/08/1995 (A)	Hampton JDRC	1) Robbery	Grand Larceny	01/12/1996	1) 120 days in jail to be served on weekends if possible - $1,000 fine
		2) Robbery from Person	Grand Larceny	01/12/1996	2) Same
	ADULT RECORD				
04/29/1996 (O)	Hampton CC	1) Robbery	Same	05/01/1997	1) 20 years prison, 10 years suspended for 50 years each, $480 restitution
		2) Robbery	Same	05/01/1997	2) Same
		3) Robbery	Same	05/01/1997	3) Same
		4) Robbery	Same	05/01/1997	4) Same
		5) Use of Firearm in Commision of Felony	Same	05/01/1997	5) 5 years prison
		6) Use of Firearm in Commission of Felony	Same	05/01/1997	6) Same
		7) Use of Firearm in Commission of Felony	Same	05/01/1997	7) Same
		8) Use of Firearm in Commission of Felony	Same	05/01/1997	8) Same
06/04/1996 (O)	Hampton CC	1) Break and Enter	Same	05/01/1997	1) 4 years prison, 2 years suspended for 50 years
		2) Grand Larceny	Same	05/01/1997	2) 8 years prison, 4 years suspended for 50 years, $2,175 restitution
06/28/1996 (O)	Hampton CC	1) Robbery	Same	05/01/1997	1) 20 years prison, 10 years suspended for 50 years each.
		2) Abduction	Same	05/01/1997	2) Same
		3) Use of Firearm in Commission of Felony	Same	05/01/1997	3) 5 years prison
		4) Use of Firearm in Commission of Felony	Same	05/01/1997	4) 3 years prison
08/09/1996 (O)	Hampton CC	1) Aggravated Maiming	Same	05/01/1997	1) Life in prison
		2) Attempted Robbery	Same	05/01/1997	2) 4 years prison, 2 years suspended for 50 years
		3) Use of Firearm in Commission of Felony	Same	05/01/1997	3) 5 years prison
		4) Use of Firearm in Commission of Felony	Same	05/01/1997	4) 5 years prison. $4,226.13 restitution
08/17/1996 (O)	**York County CC**	**1) Capital Murder**	**Same**	**10/26/1999**	**1) Instant Offense**
		2) Use of Firearm in Commission of Felony	Same	04/28/1998	2) 5 years prison
		3) Robbery	Same	04/28/1998	3) Life
		4) Abduction	Same	04/28/1998	4) Life
		5) Use of Firearm in Commission of Felony	Same	04/28/1998	5) 5 years prison
		6) Use of Firearm in Commission of Felony	Same	04/28/1998	6) 5 years prison

Pamela W Dickerson

Probation & Parole Officer
Pamela W. Dickerson

Return By _____

Number _____

VICTIM IMPACT STATEMENT
Commonwealth of Virginia

SECTION 19.2-299.1 OF THE CODE OF VIRGINIA ALLOWS CRIME VICTIMS TO SUBMIT TO THE JUDGE A STATEMENT WHICH DESCRIBES THE IMPACT OF THE CRIME(S) ON THE VICTIM AND HIS OR HER FAMILY. THIS STATEMENT MAY BE CONSIDERED BY THE COURT IN DECIDING A SENTENCE.

PLEASE COMPLETE ALL PARTS OF THIS FORM WHICH APPLY IN THIS CASE. **ADD ADDITIONAL PAGES IF NECESSARY.**

Eric Michael Nesbitt William Jones and Daryl R. Atkins
Name of Victim Name of Defendant

Mary E. Sloan

I. ECONOMIC LOSS

A. Financial Loss

1. Property Loss

List the property lost as a result of this crime. This is property that has not been and is not expected to be recovered. (Attach any relevant receipts)

Item	Make	Model	Cost
stereo CD player	Kenwood		
Amp			$500.00
speakers (box)	pyle		

Total $ _____

2. *Property Damage*
List property damage as a result of this crime. (Attach estimates/bills for repair)

Item	Make	Model	Cost
truck	Nissan	pickup	unknown
damage to left side & interior			at this time

Total $ _____

3. *Medical/Hospital Costs* (Attach copies of bills)

Total $ _____

4. *Other Economic Losses/Costs* (Lost wages and/or income)

Total $ _____

Please specify type of loss _____

Subtotal A: (Property Loss+Property Damage+Medical/Hospital+Other)

= Subtotal A $

B. Reimbursement Received

1. *Property Insurance* (Name and address of insurance company) _____ (1) ____
2. *Hospital/Medical Insurance* (2) ____
3. *Restitution Received* (3) ____
4. *Other Reimbursement(s)* (4) ____

Subtotal B: (Sum of Reimbursements)

= Subtotal B $

C. Economic Loss Not Reimbursed (Subtotal A Minus Subtotal B) **$**

II. PHYSICAL INJURIES

A. Did the victim have any physical injuries as a result of this crime? (Check one)

Yes [ ] No [X]

B. If yes, describe the physical injuries and any medical treatment the victim received.

_____

_____

III. PSYCHOLOGICAL EFFECTS AND TREATMENT

A. Describe any psychological effects of the crime. (Add additional sheets if necessary)
I'm sad all the time, thinking about my loss and the terrible thing that happened to Eric. I'm fearful for the future of my remaining children. A whole new element has been added to my feelings on motherhood. My whole adult life has been devoted to raising my children. I now wonder if it was all a waste. As a mother, you always have hope that your children will grow up and get on with their lives, but now I am filled with an incredible fear that something awful may happen to them like what happened to Eric. I know these feelings of hopelessness would have a bad affect on my children if they knew how I was feeling, so I keep them bottled up. This makes me feel even worse about Eric's death.

I have a hard time sleeping now. I lay awake every night thinking and worrying.

B. Describe any psychological treatment received or needed as a result of the crime
I tried talking to a therapist but felt it was a waste of time to sit there and cry. I don't feel this kind of treatment can handle a problem this big.

IV. LIFE CHANGES

Please describe any changes in your life as a result of this crime

I lost one of my beloved children.

V. ADDITIONAL INFORMATION

Please provide any other information you wish the court to consider about the impact of this crime

_____

_____

_____

[ ] I DO NOT WISH TO MAKE A STATEMENT.

_____

Name and Signature of person completing this form

Mary E. Sloan

Relationship to victim _____

Date of completion of form 2-22-98

(Cite as: 257 Va. 160, 510 S.E.2d 445)

Supreme Court of Virginia.

Daryl Renard ATKINS

v.

COMMONWALTH of Virginia.

Record Nos. 981477, 981478.

Jan. 8, 1999.

Bryan L. Saunders, Newport News; George M. Rogers, III, Washington, DC, for appellant.

Pamela A. Rumpz, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we review the capital murder conviction and death sentence imposed by a jury on Daryl Renard Atkins.

I.

PROCEEDINGS

On November 19, 1996, indictments were returned against Atkins charging that on August 17, 1996, Atkins abducted, robbed, and murdered Eric Michael Nesbitt in the commission of the robbery. Code §§ 18.2-48, -58, and -31(4). Atkins was also charged with use of a firearm while committing each of these offenses. Code § 18.2-53.1.[1]

---

[1] Prior to trial, Atkins pled guilty to the abduction and robbery charges and their associated firearm crimes. He does

Atkins filed a pre-trial motion to have the Virginia capital murder and death penalty statutes declared unconstitutional. Along with this motion, Atkins filed an extensive brief containing multiple theories for his assertion that the substantive criminal law and procedural statutes governing capital crimes in Virginia are constitutionally deficient. The trial court, relying on conclusive statements of this Court supporting the constitutionality of these statutes, overruled this motion. The trial court also denied Atkins' motion for additional peremptory juror challenges.

In a motion in limine, Atkins sought to limit the introduction by the Commonwealth of DNA evidence related to blood samples found in Nesbitt's truck which indicated that Atkins and Nesbitt were the sources of that blood. Atkins asserted that this evidence was not sufficiently credible because William A. Jones was also an occupant of the truck and his blood had not been subjected to the DNA testing. In the alternative, Atkins sought to have a blood sample obtained from Jones and DNA tests performed thereon to establish whether Jones was a potential source for the blood found in the truck. The trial court received a proffer from the Commonwealth that there was no evidence that Jones had been wounded and, thus, that Jones was excluded as a possible source of the blood. On this ground, the trial court denied the motion.

---

not challenge his convictions or sentences for these crimes in this appeal.

Jury selection began on February 9, 1998 and continued the next day. Starr D. Christian, a 19-year-old black female, was called from the venire and questioned by the trial court and counsel for the Commonwealth and Atkins. The trial court asked Christian if she or any member of her immediate family had "ever been the victim of a violent crime." Christian responded in the negative. Atkins' counsel subsequently asked Christian if she or any member of her immediate family had "ever been the victim of a crime, not just a violent crime, but a crime." Christian responded that her brother's car had been broken into on one occasion. Neither party challenged Christian for cause, and the trial court retained her in the venire for final jury selection. Thereafter, the Commonwealth used one of its four peremptory strikes to remove Christian from the jury. Code § 19.2-262. Atkins asserted that Christian had been struck based upon her race in violation of the ruling in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Responding to Atkins' challenge, the Commonwealth initially asserted that it struck Christian because she was young and unmarried and, thus, would be less likely, in its view, to have empathy for the victim.[2] The Commonwealth further noted that it had acquired information

---

[2] The Commonwealth also contended that Christian might lack empathy for the victim because she was not a parent, but subsequently conceded that Christian had not been questioned as to whether she had children or not. In addition, the Commonwealth conceded that it had discovered an offense report concerning an altercation between Christian and a relative that indicated that Christian possibly was a parent.

that, contrary to her testimony, Christian had been the victim of a grand larceny within the past year. The Commonwealth provided defense counsel with a copy of an offense report that listed Christian as the victim and complainant in the theft of a ring. Based upon this incident, the Commonwealth ultimately asserted Christian's lack of truthfulness as its race-neutral reason for removing her from the jury.

Atkins contended that a peremptory strike premised on the age of the prospective juror might also "run[ ] afoul of the *Batson* ruling." Atkins further contended that the Commonwealth gave "no indication nor were we told that there was a concern about [Christian's] truthfulness" at the time she was examined.

Noting its express concern over "the apparent oversight or flagrant incorrect answer to the Court's question and to counsel's question relative to victims of a crime," the trial court found that the Commonwealth had stated an adequate race-neutral reason for striking Christian from the jury. Accordingly, the trial court overruled Atkins' *Batson* challenge.

II.

EVIDENCE

A. Guilt Phase

We will review the evidence in the light most favorable to the Commonwealth. *Clagett v. Commonwealth*, 252 Va. 79, 84, 472 S.E.2d 263, 265 (1996), *cert. denied*, 519 U.S.

1122, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997). On the afternoon of August 16, 1996, William A. Jones[3] and Atkins were "drinking and smoking weed" at the home Atkins shared with his father. During the course of that afternoon, "[a] couple of [Atkins'] friends came by, in and out." On several occasions during the afternoon and later that evening, those present pooled their money, and Atkins and Jones walked to a nearby convenience store to buy beer or were driven by one of Atkins' friends to an ABC store to buy liquor.

That evening between 10:30 and 11:00 p.m., a friend of Atkins, known to Jones only as "Mark," arrived at the home. Mark had brought a handgun with him and gave it to Atkins after Atkins said "that he wanted to use it, he would bring it back in the morning." A short time later, Atkins and Jones again walked to the convenience store to buy beer. Atkins told Jones that he did not have enough money and was going to "panhandle and get some change up." Atkins had the handgun he had borrowed from Mark tucked behind the waistband of his pants, partially concealed by his belt buckle.

While Jones waited, Atkins approached several people to ask for money and collected some from one or two. Nesbitt, who was a stranger to Atkins, arrived at the store in his truck at approximately 11:30 p.m. After a brief conversation with Atkins, Nesbitt went into the store.

---

[3] Prior to Atkins' trial, Jones entered into a plea agreement with the Commonwealth dated September 5, 1997, in which Jones agreed to testify against Atkins in exchange for a reduction in the charges against him arising out of the murder of Nesbitt.

When Nesbitt returned to his truck and was preparing to leave the parking lot, Atkins "whistled" at him and Nesbitt stopped his truck.

Atkins went to the passenger's side of the truck and Jones went to the driver's side. Atkins then pointed the handgun at Nesbitt and ordered Nesbitt to "[m]ove over, let my friend drive." Jones entered the truck from the driver's side and Atkins entered from the passenger's side.

As Jones drove the truck away from the convenience store, Atkins demanded that Nesbitt surrender his wallet. Atkins removed $60 from the wallet and was returning it to Nesbitt when he noticed a bankcard inside the wallet. On Atkins' instruction, Jones drove to a branch of Crestar Bank where Atkins forced Nesbitt to withdraw $200 using the bankcard from the bank's drive- through automatic teller machine. The security camera in this automatic teller machine recorded the truck arriving at the bank shortly after midnight on August 17, 1996. The videotape produced by the camera showed that Jones was driving, Atkins was in the passenger seat, and Nesbitt was between them. Nesbitt had to lean across Jones in order to operate the machine. During this entire time, Atkins kept the handgun pointed at Nesbitt.

Jones then drove to the parking lot of a nearby school where he and Atkins discussed what they should do with Nesbitt. Jones urged Atkins to "just tie him up so we can get away." Atkins told Jones he knew of a place near his grandfather's house in Yorktown where they could leave Nesbitt and directed Jones to drive toward Yorktown on

Interstate 64. Nesbitt asked them "just don't hurt me" and made no attempt to escape.

Upon arriving in a secluded area of York County off the Lee Hall exit of Interstate 64, Atkins exited the truck and ordered Nesbitt to do the same. "Nesbitt stepped out of the vehicle and probably took two steps" when Atkins began shooting him. Jones attempted to exit the truck because he feared that some of the shots were "coming in the truck." Unable to open the driver's side door, Jones rolled down the driver's side window and "jumped" out of the truck.

Jones began to struggle with Atkins for the handgun and Atkins was shot in the leg during that struggle. After Jones obtained the handgun, he drove Atkins to the emergency room of a local hospital, leaving Nesbitt's dead body at the scene of the shooting. Outside the emergency room, Jones asked Atkins for some of the money that had been taken from Nesbitt and then drove away alone in Nesbitt's truck.

After leaving Atkins at the emergency room, Jones drove to a motel in Newport News where he abandoned Nesbitt's truck. Jones spent the next several days moving from motel to motel. He cut his hair in an attempt to disguise his appearance. Jones subsequently returned to the first motel, where police, who previously had discovered the abandoned truck at the motel and were maintaining a surveillance of the area, arrested him. The handgun was not found in the truck and was never recovered.

Garland S. Clay discovered Nesbitt's body at the crime scene sometime after 3:45 a.m. on August 17, 1996

and contacted police. Investigator Frederick T. Lyons, a member of the major crimes section of the York County Sheriff's Office, arrived at the crime scene at 5:15 a.m.

Lyons discovered six shell casings near Nesbitt's body. After determining that Nesbitt had an account at Crestar Bank, Lyons learned that two withdrawals from the account had been made at Crestar automatic teller machines the previous night, one for $60 and one for $200. Lyons obtained still photographs and the videotapes from the automatic teller machines' security cameras and distributed copies to local police and media.

After the media broadcast the photographs, several callers to a "crime line phone number" identified Jones as the driver of Nesbitt's truck. One caller told police that "a person that Mr. Jones runs with was a Daryl Atkins." Based upon these identifications, Lyons obtained an arrest warrant for Jones. After interviewing Jones' father and the father's girlfriend, Lyons "learned that Mr. Atkins was with William Jones," and obtained Atkins' address. Finding Atkins at home, Lyons was able to identify Atkins from the security camera photographs and placed him under arrest.

Dr. Leah L.E. Bush, an Assistant Chief Medical Examiner for the Commonwealth, performed an autopsy on Nesbitt's body. This autopsy revealed that Nesbitt had sustained eight separate gunshot wounds to the thorax, chest, abdomen, arms and legs. Several of the bullets exited and reentered the body. Three of the gunshot wounds were lethal. However, Nesbitt could have lived for several minutes before "the bleeding was to the point

where his blood pressure would not support consciousness and life." Three bullets were recovered during the autopsy.

Additional forensic evidence showed that the six shell casings recovered from the crime scene had all been fired from the same weapon, as were the three bullets recovered from Nesbitt's body, a bullet recovered from Nesbitt's truck, and a bullet recovered from Atkins' leg. Bloodstains found on the passenger seat and interior passenger side door of Nesbitt's truck were identified as consistent with either Nesbitt's or Atkins' blood types. None of the tested samples was identified as likely to have come from another source.

Subsequent to his arrest and prior to his trial, while an inmate in the York County jail, Atkins shared a cell with Stephen R. Burton. According to Burton, Atkins told him "[t]hat he had put a boy out of a truck in York County, that he had shot at a boy to scare him." Atkins told Burton that he was not worried about being convicted because the police "wouldn't find the weapon . . . they didn't have the weapon, the only thing they had on him was a picture holding a gun to a boy" at the automatic teller machine. Atkins also told Burton that he had shot himself in the leg, but that he could not remember it because he was "too messed up" on drugs and alcohol to realize it.

Atkins testified on his own behalf and was the only defense witness on the issue of guilt. Atkins' account of the robbery and murder was in direct conflict with that of Jones. According to Atkins, he and Jones had gone to the convenience store with the intent to rob someone, and it

was Jones who was armed and who initiated the contact with Nesbitt. Atkins maintained that Jones forced his way into Nesbitt's truck, and then gave the handgun to Atkins so that Jones could drive. Atkins admitted taking money from Nesbitt's wallet and forcing Nesbitt to withdraw money from the automatic teller machine.

Atkins further maintained that Jones said "he know [(sic)] a place and he never told me" where they could take Nesbitt and "tie him up." After leaving the interstate, according to Atkins, Jones stopped the truck, took the handgun back from Atkins, placed it in a holster on his belt, and directed Atkins and Nesbitt to change places so that Nesbitt was sitting by the passenger door. Jones then drove "a little more" and then exited the truck and ordered Nesbitt to get out of the truck as well. With regard to the critical issue of who was the "triggerman" in the murder of Nesbitt, Atkins maintained that Jones shot Nesbitt several times and that one of the shots struck Atkins in the leg.

The jury was instructed and heard closing arguments from counsel. After its deliberations, the jury returned verdicts convicting Atkins of capital murder and the associated firearm crime.

B. Penalty Phase

The Commonwealth sought the imposition of the death penalty based on the aggravating factors of future dangerousness and vileness. Code § 19.2- 264.2. During the penalty phase, to prove future dangerousness, the

Commonwealth presented evidence of Atkins' prior felony convictions, which included robbing and maiming, the testimony of several victims of prior robberies and assaults committed by Atkins, and victim impact testimony from Nesbitt's mother. After concluding the presentation of this evidence, the Commonwealth rested, and Atkins made a motion to strike the Commonwealth's evidence as to the aggravating factor of vileness on the ground that no evidence presented in the penalty phase would support such a finding. Code § 19.2-264.4(C). Over Atkins' objection, the trial court permitted the Commonwealth to reopen its case in order to have the exhibits introduced during the guilt phase included in the evidence to be considered in the penalty phase. Those exhibits included pictures of Nesbitt's body, the autopsy report, and other items.

Atkins presented the testimony of Dr. Evan Stuart Nelson, a forensic psychologist. Dr. Nelson testified that Atkins' full scale IQ is 59 with a verbal IQ of 64 and a performance IQ of 60.[4] Based on these scores, Dr. Nelson stated that Atkins "falls in the range of being mildly mentally retarded." Dr. Nelson concluded that, based on Atkins' prior behavior while incarcerated, there was a "very high likelihood" that Atkins would not be "violent within the prison" if given a life sentence.

On cross-examination, Dr. Nelson conceded that he "did not find a reason to raise a concern to the Court or

---

[4] Dr. Nelson explained that "the full scale IQ score is not a simple mathematical average between 64 and 60. It's actually putting all of the items back together, charting out a graph of the scores and then figuring out where people stand."

counsel about [Atkins'] competency" to stand trial. In addition, Dr. Nelson concluded from the data available to him that "there were no indications that [Atkins] could not appreciate the nature of his behaviors and control himself."

After all the evidence relating to the penalty phase had been received, the trial court and counsel considered jury instructions and the verdict form. The trial court granted the Commonwealth's first instruction which properly detailed the necessity of the jury finding that either one or both of the statutory aggravating factors of future dangerousness and vileness were proven beyond a reasonable doubt before it could impose the death penalty. It further provided that the jury could nonetheless impose a sentence of imprisonment for life or a sentence of imprisonment for life and a fine if "the death penalty is not justified." Finally, this instruction properly directed the jury that if the Commonwealth failed to prove beyond a reasonable doubt at least one of the aggravating factors of future dangerousness or vileness, then it was required to impose a sentence of imprisonment for life or a sentence of imprisonment for life and a fine.

The Commonwealth's second instruction defined "imprisonment for life" to mean "life without possibility of parole." The Commonwealth's third instruction detailed the possible sentences for the firearm crime. The trial court granted both of these instructions.

The Commonwealth proffered an instruction on mitigating circumstances. Atkins' counsel expressly stated that he did not want the trial court to give this instruction, and the Commonwealth withdrew it. Atkins did not

proffer an alternative instruction on mitigating circumstances and raised no objection to the absence of an express instruction on mitigation.

During the discussion of the instructions, several references were made to the proposed jury verdict forms. At that time, the Commonwealth advised the trial court that it was in the process of redrafting its proposed verdict form because "there was a revision that [Atkins' counsel] wanted [the Commonwealth] to make" in that verdict form. Atkins' counsel responded, "[U]nless [the Commonwealth has] done a major redraft, I prefer mine which gives the jury every option. [The Commonwealth's], from what I saw, was . . . limited to death." The trial court then stated, "Well, they obviously have the option of life."

A short time later, the Commonwealth's redrafted verdict form was given to the trial court and Atkins' counsel. Referring to this form, the Commonwealth stated, "Ours are the same as the Defense's, Judge. They are both Model Instructions."

Atkins' proposed verdict form contained seven alternative findings. The first six of these, in order, permitted the jury to impose either a sentence of death or one of imprisonment for life and a fine if it found that both aggravating factors were proven, if it found future dangerousness alone was proven, or if it found vileness alone was proven. The seventh finding on Atkins' form permitted the jury to impose only a sentence of life imprisonment and a fine if neither aggravating factor was found to have been proven beyond a reasonable doubt.

The Commonwealth's proposed verdict form contained six alternative findings corresponding, although in a different order, with the first six alternative findings on Atkins' proposed form. It did not provide a finding permitting the jury to impose only a life sentence and fine if neither aggravating factor was found to have been proven beyond a reasonable doubt.

After the instructions were agreed upon, the trial court reviewed the two sets of proposed verdict forms and stated, "Either is okay with the Court. I think they both say the same thing, identically the same thing." Atkins' counsel responded, "Pretty close the same thing." The Commonwealth then stated that the findings in its form were merely listed in a different order from that of the defense's form. The Commonwealth asserted that the order of its form, giving options for death and life imprisonment verdicts based on the individual aggravating factors and then the option for a verdict premised on both factors being present was more appropriate. The trial court accepted the Commonwealth's proposed verdict form. Atkins did not object to the content of the Commonwealth's verdict form at the time it was adopted by the trial court or when it was subsequently read to the jury.

In closing argument, Atkins' counsel made brief references to Atkins' low intelligence, and urged the jury to impose a sentence of life without possibility of parole rather than a death sentence. Counsel argued that a life sentence would be appropriate, based on Dr. Nelson's opinion that Atkins would be able to exercise some level of self-control within the structured environment of prison.

The jury found that Atkins both represented a future danger to society and that the murder of Nesbitt had been outrageously or wantonly vile. Based upon its finding of these aggravating factors, the jury returned a verdict imposing a sentence of death on Atkins for the murder of Nesbitt.

C. *Sentencing Hearing*

At sentencing, Atkins' counsel objected for the first time to the failure of the verdict form to include a finding permitting the jury to impose only a life sentence and fine if it found that neither aggravating factor was proven beyond a reasonable doubt. Counsel made a motion to set aside the jury's verdict imposing the death penalty. The trial court ruled that the objection was not timely, and further noted that the evidence was adequate to support the jury's findings of future dangerousness and vileness, precluding the possibility of it imposing the mandatory sentence of life imprisonment in the absence of such factors. The trial court then confirmed the jury's verdict and sentenced Atkins to death. This appeal followed.

III.

DISCUSSION

We begin by noting that Atkins has modified the order and phrasing of his assignments of error in his opening brief from those originally designated by him under Rule 5:22(b). In our discussion, we shall refer only to the 19 original assignments of error as listed by Atkins

in the Rule 5:22(b) designation.[5] *Sheppard v. Commonwealth*, 250 Va. 379, 385-86, 464 S.E.2d 131, 135 (1995), *cert. denied*, 517 U.S. 1110, 116 S.Ct. 1332, 134 L.Ed.2d 483 (1996). Atkins has not briefed or argued assignments of error 9, 13, and 20 and, thus, we will not consider them. *Id.* at 386, 464 S.E.2d at 135.

A. Issues Previously Decided

In assignments of error 3, 4, 5, 6, 7, and 8, Atkins raises various challenges to the constitutionality of the Virginia capital murder statute and the statutory scheme under which capital murder trials are conducted and death sentences are reviewed on appeal. In addition, in assignment of error 12, Atkins asserts the general proposition that "the Virginia Death Penalty Statutes Violate the Virginia and United States Constitutions." On brief, Atkins does not make a particularized argument relevant to assignment of error 12, but simply identifies it as being subsumed within the argument of his other constitutional challenges. The arguments raised in these assignments of error, which in several instances are overlapping, have been thoroughly addressed and rejected in numerous prior capital murder cases.[6] We find no reason to modify our previously expressed views on these issues.

---

[5] In the Rule 5:22(b) designation, the assignments of error are numbered from 1 to 20, but there is no assignment of error numbered 18.

[6] *See, e.g., Barnabei v. Commonwealth*, 252 Va. 161, 178-79, 477 S.E.2d 270, 280 (1996), *cert. denied*, 520 U.S. 1224, 117 S.Ct. 1724, 137 L.Ed.2d 845 (1997) (aggravating factors of future dangerousness and vileness are not unconstitutionally vague); *Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865, *cert. denied*, 516 U.S. 876, 116 S.Ct. 204, 133 L.Ed.2d 137 (1995) (death penalty does not constitute cruel and unusual punishment; appellate review process does not deprive defendant of statutory rights and due process of law); *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 675, *cert. denied*, 513 U.S. 971, 115 S.Ct. 442, 130 L.Ed.2d 353 (1994) (method of instructing jury on mitigation does not impermissibly interfere with jury's consideration of evidence offered in mitigation); *Stewart v. Commonwealth*, 245 Va. 222, 229, 427 S.E.2d 394, 400, *cert. denied*, 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993) (proof of future dangerousness by prior criminal convictions does not violate double jeopardy); *Smith v. Commonwealth*, 219 Va. 455, 476- 77, 248 S.E.2d 135, 148 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979) ("vileness" and "dangerousness" predicates for imposition of the death penalty do not impermissibly fail to guide the jury's discretion).

Atkins further assigns error to the trial court's failure to grant him additional peremptory strikes during jury selection. *See* Code § 19.2-262. We have repeatedly held that there is no right to additional peremptory challenges in a capital murder trial. *See, e.g., Strickler v. Commonwealth*, 241 Va. 482, 489, 404 S.E.2d 227, 232, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991).

B. Request for Blood Sample

Atkins assigns error to the trial court's denial of his motion in limine to have a blood sample taken from Jones or in the alternative limiting the Commonwealth's presentation of the results of DNA testing of the blood found at the scene of the murder. Atkins contends that in doing so, the trial court interfered with his "right to call evidence in his favor." We disagree.

In arguing his motion, Atkins conceded that there was no evidence to suggest that Jones was a potential source of any of the blood evidence recovered from the crime scene. The evidence at trial showed that each of the blood samples could almost certainly be linked to either Nesbitt or Atkins. Therefore, Atkins' request that a sample of Jones' blood be taken for DNA comparison to the blood found at the crime scene was not founded on any reasonable claim that it was necessary to his defense. *See O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). Moreover, Atkins cannot demonstrate that the failure to make that evidence available to him was materially prejudicial to the presentation of his theory of the case. *See Satcher v. Commonwealth*, 244 Va. 220, 244-45, 421 S.E.2d 821, 836 (1992), *cert. denied*, 507 U.S. 933, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993).

C. *Batson Challenge*

Atkins contends that the trial court erred in overruling his *Batson* challenge to the Commonwealth's peremptory strike of Christian. While making only a cursory argument on this issue on brief, during oral argument of this appeal Atkins' counsel asserted that the Commonwealth's proffer of the offense report was insufficient to establish that Christian had actually been the victim of a crime and, thus, that it would not support the Commonwealth's contention that Christian had failed to answer the trial court's and counsel's questions truthfully.

In *Batson*, the United States Supreme Court held that purposeful discrimination based on race in selecting

jurors violates the Equal Protection Clause. *Batson*, 476 U.S. at 89, 106 S.Ct. 1712. If an accused makes a *prima facie* showing of the prosecution's use of peremptory strikes on the basis of race, the burden shifts to the prosecution to articulate race-neutral reasons for such strikes. *Chichester v. Commonwealth*, 248 Va. 311, 323, 448 S.E.2d 638, 646 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995). On appeal, we will assume, without deciding, that Atkins made a *prima facie* showing of a discriminatory strike. Thus, we consider whether the trial court abused its discretion in accepting the Commonwealth's articulated race-neutral reason for striking the prospective juror. A trial court's determination whether the reason given is race-neutral is entitled to great deference, *Spencer v. Commonwealth*, 238 Va. 295, 310, 384 S.E.2d 785, 795 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990), and will not be reversed on appeal unless it is "clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

There is no merit to Atkins' contention on this issue. The trial court was not required to determine whether the criminal complaint filed by Christian would ultimately prove sufficient to establish that she had actually been the victim of a crime. Nor was the Commonwealth required to show that Christian could have been struck for cause. Rather, the Commonwealth's burden was to show that it had a sufficient race-neutral reason for using one of its peremptory strikes in removing Christian from the jury. At the time the Commonwealth exercised this peremptory strike, it had a sufficient subjective basis for questioning Christian's truthfulness. The trial court

accepted the Commonwealth's stated basis for its action, and that decision is clearly supported by the record.

D. Admission of Atkins' Statement to Police

On August 21, 1996, Atkins voluntarily gave a statement to Investigator Lyons in which Atkins admitted his participation in the abduction, robbery, and murder of Nesbitt. In that statement, however, Atkins denied that he had been the "triggerman" and asserted that Jones alone had shot Nesbitt. At trial, during cross-examination of Lyons, Atkins' counsel attempted to elicit testimony from Lyons that Atkins' statement contained this denial and assertion. The Commonwealth objected on the ground that, while the statement inculpated Atkins as a participant in these crimes, Atkins' denial that he was the "triggerman" was self-serving and inadmissible hearsay. The trial court ultimately sustained that objection and cautioned the jury to disregard any reference to this statement.

Subsequently during his testimony, Atkins was permitted to reference the content of this statement in great detail. Significantly, Atkins testified that in his prior statement he "told them that William Jones pulled the trigger." Consistent with that assertion, Atkins further testified that he did not "shoot a gun" on the night of the murder and that Jones had shot Nesbitt.

On brief, Atkins asserts only that "Mr. Atkins' statement to the [police] should have been admitted as an exception to the hearsay rule under the statement against penal interest exception." This assertion simply ignores

the fact that the statement was ultimately admitted in conjunction with Atkins' testimony, and that the jury clearly had the benefit of Atkins' prior consistent assertion to bolster his trial testimony that he was not the triggerman. Thus, no prejudice resulted to Atkins. Moreover, there is no merit to Atkins' assertion that his prior statement should have been admitted during Lyons' testimony.

At the time of Lyons' testimony, Atkins had not testified and the limited circumstances in which a prior consistent statement is admissible were not applicable. *See Manetta v. Commonwealth*, 231 Va. 123, 128 n. 3, 340 S.E.2d 828, 831, n. 3 (1986). Atkins' prior consistent statement on the triggerman issue provided no basis to impeach the testimony of Lyons because Lyons was not the declarant or otherwise bound by the statement. Nor could the statement have been admitted as being against penal interest, since Atkins, the declarant, was not "unavailable" to testify at trial, which is a prerequisite to invoke that exception to the hearsay rule. *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978)

E. Sufficiency of the Evidence

Atkins contends that the trial court erred in failing to set aside the jury's verdict convicting him of capital murder because the evidence failed to establish beyond a reasonable doubt that he was the triggerman in the killing of Nesbitt. On brief, Atkins candidly states that "[t]his case comes down to the testimony of Mr. William A. Jones and Stephen R. Burton against the testimony of Mr. Atkins." During oral argument of this appeal, Atkins'

counsel conceded that, to find error in the trial court's action, this Court would be required to reweigh the evidence and make determinations as to the credibility of the witnesses and their testimony.

"[T]he credibility of witnesses and the weight to be accorded their testimony are questions for the fact finder." *Saunders v. Commonwealth*, 242 Va. 107, 113, 406 S.E.2d 39, 42, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991). Where the jury has seen and heard the witnesses and assessed their credibility and the weight of their testimony, its determination of the facts will not be overturned on appeal unless it is plainly wrong or without evidence to support it. Code § 8.01-680.

Thus, while Atkins may selectively craft an interpretation of the evidence to fit his claims of innocence, and attack the credibility and motivation of Jones and Burton, the trial court, and this Court on appeal, may not substitute its own judgment for that of the jury where a reasonable interpretation of the evidence supports the verdict. Here, the evidence when viewed in its entirety supports the jury's determination that, beyond a reasonable doubt, Atkins was directly responsible for Nesbitt's death and that Atkins was the triggerman. Accordingly, the trial court did not err in refusing to set aside the conviction for capital murder.

F. The Verdict Form[7]

Atkins asserts that the jury was not properly "instructed" during the penalty phase because the verdict form failed to provide the jury with the option of sentencing Atkins to life imprisonment upon a finding that neither of the aggravating factors of future dangerousness or vileness was proven beyond a reasonable doubt. We agree.

It is a well established rule that under normal circumstances a trial court is under no obligation to amend or correct an instruction that contains a misstatement of law. However, "when the principle of law is materially vital to [the] defendant in a criminal case, it is reversible

---

[7] This issue was raised in assignment of error 19, which asserts errors in the instruction of the jury in both the guilt phase with respect to accomplice testimony, and in the penalty phase on the issue discussed herein. During oral argument of this appeal, Atkins' counsel conceded that he had not proffered an instruction on accomplice testimony at the conclusion of the guilt phase or objected to the trial court's failure to give such an instruction *sua sponte* and, thus, that the issue was not properly preserved for appeal. Rule 5:25.

In addition, the Commonwealth asserts on brief that assignment of error 19 is inadequate to encompass a challenge to the verdict form because a verdict form is not an "instruction" to the jury, but is merely a tool to aid the jury in rendering its verdict. However, during discussion of this issue at trial, the trial court, the Commonwealth, and Atkins' counsel used the terms "verdict form," "finding form," and "finding instructions" interchangeably. Moreover, in this context, the term "instruction" is sufficiently broad to cover any statement of the law given by the trial court to the jury, which would necessarily include the written verdict form required by Code § 19.2-264.4(D).

error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form." *Whaley v. Commonwealth*, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973); *accord Bryant v. Commonwealth*, 216 Va. 390, 392-93, 219 S.E.2d 669, 671-72 (1975). Clearly, it is materially vital to the defendant in a criminal case that the jury have a proper verdict form. Moreover, Atkins submitted a proper verdict form, as required by Code § 19.2-264.4(D) and, thus, there can be no question that the trial court, while having the discretion to elect between the two forms proffered to it, had the duty to give the jury a proper verdict form. It was the Commonwealth's verdict form that was erroneous and, thus, when the trial court accepted the Commonwealth's assertion that the order of sentencing options in its form was preferable, it was the Commonwealth, and not Atkins, that placed the trial court in the position of erring when it failed to correct the omission in the Commonwealth's form.[8]

In the present case, the Commonwealth represented to both the trial court and Atkins' counsel that its proposed verdict form was "the same as the Defense's" except that the alternative findings varied in order. This

[8] We note further that, while not raising a precise objection to the Commonwealth's proposed verdict form at the time it was selected by the trial court, Atkins' counsel consistently stated his preference for the form he had submitted to the trial court. *Cf. Pilot Life Insurance Co. v. Karcher*, 217 Va. 497, 498, 229 S.E.2d 884, 885 (1976) (where a party proffers an alternative instruction that is a correct statement of the law, this, without more, will be adequate to preserve for appeal a challenge to the instruction actually given).

simply was not accurate. The Commonwealth's form contained no alternative finding permitting the jury to impose only a life sentence if neither future dangerousness nor vileness had been proven beyond a reasonable doubt. Thus, each of the Commonwealth's alternative verdicts required the jury to find at least one of the aggravating factors to have been present before imposing a sentence of either death or life imprisonment. Although neither the trial court nor Atkins' counsel noted the discrepancy between the Commonwealth's proposed verdict form and Atkins' form, Atkins' counsel was entitled to rely upon the Commonwealth's representation that there was no discrepancy between the forms and it had merely varied the order of the findings from that in Atkins' form.

The trial court's use of the Commonwealth's form resulted in the jury receiving a verdict form which was incomplete and which did not comport with the correct statement of law given to the jury by the trial court in its first instruction. We need go no further in our analysis to determine whether the jury in fact was left with the impression, contrary to the trial court's instruction, that it was required first to find that at least one of the aggravating factors was present. The jury was presented with a confusing situation in which the trial court's instructions and the form the jury was given to use in discharging its obligations were in conflict.

For these reasons, we will set aside the sentence of death imposed by the jury and remand the case to the trial court for a new penalty proceeding.

G. Reopening of Commonwealth's Case in the Penalty Phase

Asserting that the Commonwealth failed to introduce any evidence of vileness prior to resting its case during the penalty phase, Atkins contends that the trial court erred in failing to strike the Commonwealth's evidence as to that aggravating factor and instead permitting the Commonwealth to reopen its case in order to reintroduce the exhibits used in the guilt phase to establish the vileness of the crime. Because of the ultimate disposition we make in this appeal, this issue is moot. We note, however, that because Code § 19.2-264.4(B) requires that the sentencing jury consider "the circumstances surrounding the offense" in determining punishment, the Commonwealth will be permitted to reintroduce such evidence on remand as is relevant to prove the existence of either aggravating factor.

H. Statutory Review of Death Penalty

Because we have determined that there was reversible error in the penalty phase of Atkins' trial which will necessitate a remand to the trial court, we need not consider at this time "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17.1-313.[9]

---

[9] Title 17.1 superseded former Title 17 effective October 1, 1998 and prior to the argument of this appeal. The current statute, Code § 17.1-313, provides for review by this Court in the same manner as the now superseded provisions of Code § 17-110.1, the statute under which the parties briefed the appeal.

IV.

CONCLUSION

For the reasons stated, we find no reversible error in the guilt phase of Atkins' trial, and, accordingly, we will affirm Atkins' conviction for capital murder. Because there was error in the penalty phase of the trial with respect to the imposition of the death penalty, we will reverse the sentence of death and remand the case to the trial court for a new penalty proceeding on the capital murder conviction.

Affirmed in part, reversed in part, and remanded.

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

DARYL RENARD ATKINS,
Defendant

V. **RECORD NO. 000395**

COMMONWEALTH OF VIRGINIA

APPELLANT'S ASSIGNMENTS OF ERROR AND DESIGNATION OF THE RECORD

Pursuant to Rule 5:22 of the Supreme Court of Virginia, Daryl Renard Atkins, by Counsel, makes the following assignments of error and designation of the record:

ASSIGNMENTS OF ERROR

1]. The sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor.

2]. The sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

3]. Virginia's bifurcated jury system as applied in capital re-sentencings by limiting the information the sentencing jury has when determining whether, or not, to impose a death penalty and by limiting the ability of the defendant to respond to the evidence and argument of the Commonwealth, violates the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Virginia Constitution, both generally and applied in this case. [Transcript of 8/17/99 pages 35 through 39; page 20; Transcript of 8/19/99 page 136].

4]. The Court erred in overruling the Mr. Atkins challenge to the Commonwealth's peremptory strike of venireman, Stuart Hedgepeth, Sr. pursuant to *Batson v. Kentucky* [Transcript of 8/18/99 pages 20-21].

5]. The Court erred in denying Mr. Atkins' Motion to Strike [Transcript of 8/18/99 pages 169-170 and pages 316-317; Transcript of 8/19/99 page 136].

6]. The Court erred in limiting Mr. Atkins' examination of Investigator F. T. Lyons thereby limiting the evidence in mitigation Mr. Atkins was able to present [Transcript of 8/18/99 pages 173-184].

7]. The Court erred in failing to properly instruct the jury [Transcript of 8/19/99 pages 77 through 80 and pages 83 through 86].

8]. The Court erred in denying Mr. Atkins' motion to strike the entire panel of veniremen in violation of his rights under the 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Virginia Constitution [Transcript of 8/17/99 pages 34-35; and pages 141-142].

DESIGNATION OF THE RECORD

1]. Order of the Supreme Court of Virginia remanding for a new sentence.

2]. Indictment CR96-8229-01;

3]. All exhibits introduced by both the Commonwealth and the defendant.

4]. Transcript of hearing of 8/17/99: pages 10-11; pages 163 through 178; pages 34 through 39; pages 141-142 and pages 197 through 202.

6]. Transcript of hearing of 8/18/99: pages 21-21; pages 39 through 345.

7]. Transcript of hearing of 8/19/99: pages 5 through 50; pages 77 through 80; pages 83 through 86 and page 136.

8]. Instructions offered by Mr. Atkins which were denied by the Court.

9]. All jury instructions.

10]. Sentencing Order of 11/22/99.

11]. Notice of Appeal.

RESPECTFULLY SUBMITTED

DARYL RENARD ATKINS

by: Bryan L. Saunders
OF COUNSEL

CERTIFICATE

I hereby certify that a true copy of the above Assignments of Error and Designation of the Record was delivered to Mark L. Early, Attorney General Of Virginia, 900 East Main Street, Richmond, Virginia 23219, this 6th March, 2000.

/s/ Bryan L. Saunders
Bryan L. Saunders

Bryan L. Saunders
728 Thimble Shoals Blvd
Suite C
Post Office Box 1633
Newport News, VA 23601-0633
(757) 873-0043

George M. Rogers, III
2019 Cunningham Drive
Suite 414
Hampton, Va. 23666-3318
(757) 826-7778

(Cite as: 534 S.E.2d 312)

Supreme Court of Virginia.

Daryl Renard ATKINS

v.

COMMONWEALTH of Virginia.

Record No. 000395.

Sept. 15, 2000.

Bryan L. Saunders, Newport News; George M. Rogers, III, Washington, DC, for appellant.

Pamela A. Rumpz, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KINSER, Justice.

Daryl Renard Atkins was convicted in the Circuit Court of York County of the 1996 capital murder of Eric Michael Nesbitt and sentenced to death. On appeal, we affirmed his conviction, *Atkins v. Commonwealth*, 257 Va. 160, 180, 510 S.E.2d 445, 457 (1999), but remanded the case to the circuit court for a new penalty proceeding due to an improper jury sentencing verdict form, *id.* at 177-79, 510 S.E.2d at 456-57.[1] At resentencing, a different jury found that there is a probability that Atkins would commit acts of violence in the future that would constitute a continuing serious threat to society, and that his conduct

[1] Atkins was also convicted of abduction, robbery, and use of a firearm while committing those offenses. In his first appeal, he did not challenge these convictions. *Atkins*, 257 Va. at 163 n. 1, 510 S.E.2d at 447 n. 1.

in committing the capital murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." The jury fixed Atkins' punishment at death. At a separate sentencing hearing, the circuit court imposed the death penalty in accordance with the jury verdict. Atkins now appeals that sentence.

Atkins assigns eight errors on appeal. After considering those issues and conducting our mandated review pursuant to Code § 17.1-313(C), we find no error in the judgment of the circuit court and will affirm the imposition of the death penalty.[2]

I. ISSUES REGARDING MITIGATION

In three related assignments of error, Atkins raises the question whether the circuit court improperly inhibited the jury's consideration of mitigating evidence. First, he asserts that Virginia's bifurcated jury system, as applied when a case is remanded for a new sentencing hearing before a different jury, unconstitutionally limits a defendant's ability to present relevant evidence from the guilt phase of the previous trial. Second, Atkins claims that the circuit court erred in limiting his examination of Frederick T. Lyons, an investigator with the York County sheriff's office, thereby denying Atkins the opportunity

[2] We recited the evidence in the record in our prior decision, *Atkins*, 257 Va. at 165-69, 510 S.E.2d at 449-51. We need not repeat that evidence here, except to the extent necessary as part of our analysis of Atkins' assignments of error in this appeal.

to present a complete defense, including mitigating evidence, at his new sentencing hearing. Finally, Atkins argues that the circuit court erred in refusing to instruct the jury about mitigating factors. We find no merit to these claims.

Initially, to the extent that Atkins contends that Virginia's bifurcated jury system is constitutionally defective because he could not, at his resentencing, present evidence and argue "residual doubt" with regard to his guilt in the commission of the crime, that contention has been previously addressed and rejected by this Court.[3] *See Stockton v. Commonwealth*, 241 Va. 192, 210-11, 402 S.E.2d 196, 206-07, *cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991) (defendant not allowed to introduce evidence and argue "residual doubt" at new sentencing hearing); *Frye v. Commonwealth*, 231 Va. 370, 393, 345 S.E.2d 267, 283 (1986) (defendant cannot contest correctness of guilty verdict at sentencing phase); *see also Franklin v. Lynaugh*, 487 U.S. 164, 173, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (defendant is not entitled to jury instruction on "residual doubt"). We find no reason to depart from our precedent.[4]

---

[3] In addition, the Commonwealth filed a motion in limine to prohibit Atkins from presenting evidence or argument with regard to any factual issue concerning his guilt. The circuit court granted the motion, and ordered Atkins and his counsel "to refrain from any attempt, during the resentencing proceeding, to inquire into, comment upon or argue any factual issue relative to [Atkins'] guilt." Atkins has not assigned error to the circuit court's order granting the motion in limine. *See* Rule 5:17.

[4] That precedent does not mean that a defendant can never present evidence from the guilt phase of a trial at a subsequent resentencing hearing. Depending on the facts of each case, certain guilt-phase evidence may also be relevant to issues at resentencing, especially if the vileness predicate is at issue. Even when such evidence is relevant, a defendant still cannot argue or present evidence concerning "residual doubt." *Stockton*, 241 Va. at 210-11, 402 S.E.2d at 206-07.

However, Atkins contends that the evidence he sought to introduce through the testimony of Lyons was not offered for the purpose of creating "residual doubt" about his guilt. Specifically, during direct examination, Atkins' counsel asked Lyons, "[A]fter you advised [Atkins] of [his Miranda] rights, did [Atkins] confess to you his involvement in the murder of Eric Nesbitt?" According to Atkins, the information that he sought to elicit by that question was the fact that he had admitted his participation in the murder of Nesbitt. Atkins argues that such information was relevant to the issues of Atkins' remorse and his cooperation with law enforcement authorities, both of which are proper subjects of mitigating evidence.

The Commonwealth objected to the question, contending that it called for a hearsay statement. The Commonwealth also noted that, while Atkins confessed to Lyons his involvement in the abduction, robbery, and murder of Nesbitt, Atkins denied that he was guilty of capital murder. In the confession to Lyons, Atkins maintained that his accomplice alone was the "triggerman." Thus, according to the Commonwealth, for Lyons to appropriately answer the propounded question, he would have to tell the jury that Atkins denied that he pulled the trigger, which would have been contrary to the circuit court's prior ruling that evidence regarding

Atkins' guilt would not be admitted at the resentencing hearing.

The circuit court sustained the Commonwealth's objection on the basis that the testimony being elicited from Lyons was hearsay.[5] We agree.

In Atkins' initial appeal to this Court, we considered this same evidence and held that no exception to the hearsay rule applied which would allow Lyons to testify about the content of Atkins' statement to him. *Atkins*, 257 Va. at 176, 510 S.E.2d at 455. The proffer of this evidence at the resentencing hearing does not change the hearsay analysis. According to Code § 19.2-264.4(B), mitigating evidence relevant to sentencing is "subject to the rules of evidence governing admissibility." *See Cherrix v. Commonwealth*, 257 Va. 292, 309, 513 S.E.2d 642, 653, *cert. denied*, 528 U.S. 873, 120 S.Ct. 177, 145 L.Ed.2d 149 (1999) (subject to rules of evidence governing admissibility, trial court has discretion under Code § 19.2-264.4(B) to determine what evidence may be adduced in mitigation of offense); *Coppola v. Commonwealth*, 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62

[5] Atkins' counsel proffered to the court that Lyons would also testify that Atkins admitted his involvement in certain crimes committed in the City of Hampton. The orders showing Atkins' convictions for those crimes had already been introduced into evidence and, as noted by the Commonwealth, reflected whether Atkins had pled guilty to those crimes. The circuit court sustained the Commonwealth's objection to this additional evidence also on the basis that it was hearsay. After the court sustained the Commonwealth's objections, Atkins' counsel did not ask Lyons any additional questions and advised the court that Lyons was no longer needed as a witness.

L.Ed.2d 788 (1980) (same); *but see O'Dell v. Commonwealth*, 234 Va. 672, 701-02, 364 S.E.2d 491, 508, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988) (holding that hearsay evidence contained in postsentence report is admissible based on language of Code §§ 19.2-264.5 and -299).

In any event, we believe that the information that Atkins sought to elicit from Lyons improperly would have interjected at the new sentencing hearing a question about Atkins' guilt. In that statement to Lyons, Atkins denied that he was the "triggerman" and accused his accomplice of shooting Nesbitt. *Atkins*, 257 Va. at 175, 510 S.E.2d at 455. As we previously stated, a defendant is not allowed to argue or present evidence of "residual doubt" at a new sentencing hearing. *Stockton*, 241 Va. at 211, 402 S.E.2d at 207.

Finally, Atkins contends that the circuit court erred by denying certain proposed instructions on the mitigation factors contained in Code § 19.2-264.4.[6] Specifically, Atkins requested the court to instruct the jury that it may consider, in mitigation, Atkins' age at the time of the offense, his mental retardation, and any other evidence that would tend to favor a sentence of life imprisonment. However, the record before us shows that Atkins withdrew the requested instruction. Regardless, this Court has consistently held that defendants being sentenced for capital murder are not entitled to jury instructions that

[6] Instead, the circuit court instructed the jury that it should consider any evidence presented in mitigation of the offense that tended to make life imprisonment without the possibility of parole a more appropriate punishment than death.

list the specific types of mitigating factors a jury may consider. *George v. Commonwealth*, 242 Va. 264, 283, 411 S.E.2d 12, 23 (1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Eaton v. Commonwealth*, 240 Va. 236, 257, 397 S.E.2d 385, 398 (1990), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991); *Gray v. Commonwealth*, 233 Va. 313, 351, 356 S.E.2d 157, 178, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). We will not depart from our prior decisions today.

II. ISSUES REGARDING THE JURY

Atkins raises two issues with regard to the composition and selection of the jury. He first contends that the circuit court erred in denying his motion to strike the entire venire because it did not accurately represent the demographic make-up of the population of York County. Second, he challenges the Commonwealth's use of one of its peremptory strikes.

With regard to the first issue, Atkins argued at trial that the venire, which contained only three Black members, did not represent a fair cross-section of the community. According to Atkins' counsel, York County's population is 30 percent Black. In denying Atkins' motion, the circuit court noted that the venire had been randomly selected.

Systematic exclusion of a "distinctive group in the community" must be shown in order to establish that a defendant's constitutional right to a fair jury selection system has been violated. *Chichester v. Commonwealth*, 248 Va. 311, 324, 448 S.E.2d 638, 647 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995). Atkins

does not contend that there was such exclusion, nor does the record in this case suggest any systematic exclusion of Black members of the community from the venire. Thus, we find no merit in Atkins' claim.

On the second issue, Atkins contends that the Commonwealth's exercise of a peremptory strike to remove the only remaining Black juror violated the rule established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), holding that peremptory strikes based solely upon a juror's race violate the Equal Protection Clause. In deciding whether a peremptory strike is racially motivated in violation of *Batson*, a trial court "must consider the basis of the challenge[ ], the reasons proffered for the strike [ ], and any argument presented that such reasons, even if race-neutral, are pretextual, to determine whether the challenger has met [the] burden of proving purposeful discrimination in the selection of a jury panel." *Chandler v. Commonwealth*, 249 Va. 270, 277, 455 S.E.2d 219, 223, *cert. denied*, 516 U.S. 889, 116 S.Ct. 233, 133 L.Ed.2d 162 (1995). We will reverse a trial court's findings that there was no purposeful discrimination in the striking of a juror and that the reasons proffered by the Commonwealth were racially neutral only where such findings are clearly erroneous. *Id.*

The juror in question testified that he took medication for a thyroid condition and that the medication caused him to feel "bombed out" and "drowsy" at times. Because of the juror's medical condition, the Commonwealth expressed concern about the juror's ability to pay close attention to the evidence. The circuit court determined that the Commonwealth had proffered a sufficiently race-neutral reason to strike the juror, and we

conclude that this finding was not clearly erroneous. *See Stockton*, 241 Va. at 209, 402 S.E.2d at 205-206 (concern about juror's attentiveness was race-neutral reason for striking juror).

III. MOTION TO STRIKE COMMONWEALTH'S EVIDENCE

Next, Atkins asserts that the circuit court should have granted his motion to strike the Commonwealth's evidence at the new sentencing hearing because that evidence was insufficient to prove either the future dangerousness or the vileness aggravating factor. Atkins makes no argument on this assignment of error beyond this mere assertion. Upon reviewing the record, we find evidence sufficient to prove beyond a reasonable doubt both Atkins' future dangerousness and the vileness of his crime.

To establish the future dangerousness predicate for imposition of the death penalty, the factfinder may consider a defendant's past criminal record, a defendant's prior history, the circumstances surrounding the commission of the offense under consideration, and the heinousness of the crime. *Edmonds v. Commonwealth*, 229 Va. 303, 312, 329 S.E.2d 807, 813, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). In the present case, the Commonwealth presented evidence showing that Atkins had at least 18 prior felony convictions for such crimes as attempted robbery, robbery, abduction, breaking and entering with the intent to commit larceny, grand larceny, maiming, and use of a firearm. In addition, the jury not only heard the details of several robberies that Atkins

committed, including one in which Atkins hit a victim over the head with a bottle, but also learned about an incident during which he shot a woman in the stomach without provocation. Thus, we conclude that there was sufficient evidence to support the jury's finding of Atkins' future dangerousness.

With respect to the vileness predicate, Code §§ 19.2-264.2 and – 264.4(C) define vileness as conduct that "was outrageously or wantonly vile, horrible or inhuman" involving "torture, depravity of mind or an aggravated battery to the victim." Proof of either torture, depravity of mind, or an aggravated battery is sufficient to support a finding of vileness. *Bunch v. Commonwealth*, 225 Va. 423, 442, 304 S.E.2d 271, 282, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983).

Based on testimony from the assistant chief medical examiner who autopsied Nesbitt's body, the jury learned that Atkins shot Nesbitt eight times. Three of the gunshots caused mortal wounds. One of those gunshots penetrated the left chest cavity and perforated both lungs and the heart; the second one, to the left lateral back, perforated the right lung and aorta; and the third fatal shot perforated the arm, re-entered the abdomen, and perforated the iliac artery. However, none of the fatal shots was immediately lethal; they would not have caused immediate unconsciousness or paralysis; and Nesbitt may have survived several minutes before dying from internal bleeding. Nesbitt also sustained several scrapes or abrasions, including a large linear abrasion on his right forehead.

This Court has defined the term "aggravated battery" used in Code §§ 19.2-264.2 and -264.4(C) to mean " 'a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.' " *Goins v. Commonwealth*, 251 Va. 442, 468, 470 S.E.2d 114, 131, *cert. denied*, 519 U.S. 887, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996) (quoting *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979)). Thus, we find sufficient evidence to support the jury's finding that Atkins' murder of Nesbitt was "outrageously or wantonly vile." Code §§ 19.2-264.2 and -264.4(C).

IV. PREJUDICE AND PROPORTIONALITY REVIEW

Whenever a sentence of death is imposed, this Court is required to determine whether that sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor; and [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17.1-313(C). With regard to these two questions, both assigned as errors by Atkins, we initially note that Atkins has presented no argument that his sentence of death was influenced by passion, prejudice or any other arbitrary factor, nor has our review of the record revealed any such improper influence.

With respect to the proportionality question, Atkins does not argue that his death sentence is disproportionate to the penalties imposed for crimes similar to the one he perpetrated, namely premeditated murder with a firearm in the commission of a robbery, where the death penalty

was imposed on the basis of both the future dangerousness and vileness predicates. Nor, given our previous cases, could he do so convincingly because juries in this Commonwealth regularly impose the death penalty for capital murders comparable to the one at issue in this case.[7] *See Graham v. Commonwealth*, 250 Va. 79, 80, 81 and n. *, 83, 89, 459 S.E.2d 97, 97 and n. *, 98-99, 102, *cert. denied*, 516 U.S. 997, 116 S.Ct. 535, 133 L.Ed.2d 440 (1995) (death sentence imposed for murder in commission of robbery based on both vileness and future dangerousness predicates; defendant had 14 prior convictions; victim shot while lying in parking lot); *Strickler v. Commonwealth*, 241 Va. 482, 487-88, 496-98, 404 S.E.2d 227, 231, 236-37, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991) (death sentence imposed upon findings of vileness and future dangerousness where defendant with eight felony convictions took victim to deserted field and killed her; death was not instantaneous); *Gray*, 233 Va. at 341, 352-54, 356 S.E.2d at 172-73, 179-80 (defendant with at least 13 prior felony convictions sentenced to die based on future dangerousness and vileness after forcing victim into his car, taking victim's wallet and robbing victim's store, and then driving to secluded area where defendant shot victim six times after assuring victim that he would

---

[7] Pursuant to Code § 17.1-313(E), we have accumulated the records of all capital murder cases reviewed by this Court. Those records include not only cases in which the death penalty was imposed, but also those in which a life sentence was imposed and the defendant appealed to this Court. *Orbe v. Commonwealth*, 258 Va. 390, 404, 519 S.E.2d 808, 816 (1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1970, 146 L.Ed.2d 800 (2000) (citing *Whitley v. Commonwealth*, 223 Va. 66, 82, 286 S.E.2d 162, 171, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)).

not be harmed); *Edmonds*, 229 Va. at 304, 307, 312-14, 329 S.E.2d at 809-10, 813-15 (during robbery, victim sustained multiple wounds including stab wound to neck; defendant had 3 felony and 13 misdemeanor convictions; death sentence imposed based on findings of vileness and future dangerousness); *Briley v. Commonwealth*, 221 Va. 563, 566-68, 578, 580-81, 273 S.E.2d 57, 58-60, 66-68 (1980) (defendant convicted of capital murder in commission of robbery and sentenced to death based on findings of vileness and future dangerousness; victim forced to lie on floor during rape of victim's mother and murder of both parents prior to victim's death by gunshot; defendant had numerous criminal convictions including armed robbery and attempted murder).

Focusing on the statutory directive that this Court's proportionality review take into account not only the crime but also the defendant, *see* Code § 17.1-313(C), Atkins, however, does assert that he is mentally retarded and thus cannot be sentenced to death. He bases his argument upon his purported full scale IQ of 59 and contends that the death penalty has not been imposed on any defendant in this Commonwealth with an IQ score as low as his. In response, the Commonwealth points out that the evidence was in conflict regarding the question whether Atkins is mentally retarded. Quoting from *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Commonwealth also contends that execution of a defendant who is mentally retarded does not contravene the practices that were condemned when the Bill of Rights was adopted or the evolving standards of decency.

Atkins' full scale IQ score was based on a test known as the Wechsler Adult Intelligence Scale-III (WAIS-III),

which was administered to him by a forensic clinical psychologist, Dr. Evan Stuart Nelson.[8] According to Dr. Nelson, Atkins' full scale IQ of 59 means that Atkins is mildly mentally retarded. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) 40 (1994). However, Dr. Nelson also acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered the test.

Dr. Nelson further explained that a diagnosis of mental retardation is not simply a question of an IQ score. Mental retardation also involves the inability to function independently as compared to the norm for persons of the same age. Consequently, a diagnosis of mental retardation is based on an individual's IQ scores along with that person's ability to function in the world. Finally, despite his opinion that Atkins is mildly mentally retarded, Dr. Nelson admitted that Atkins' capacity to appreciate the criminal nature of his conduct was impaired, but not destroyed; that Atkins understood that it was wrong to shoot Nesbitt; and that Atkins meets the general criteria for the diagnosis of an antisocial personality disorder.

In addition to Dr. Nelson's testimony, the jury heard testimony from Dr. Stanton E. Samenow, a forensic clinical psychologist called as a witness by the Commonwealth. Based on two interviews with Atkins, Dr.

---

[8] On the same test, Atkins also had a verbal IQ score of 64 and a performance IQ score of 60.

Samenow "sharply disagree[d]" with Dr. Nelson's conclusion that Atkins is mildly mentally retarded. Instead, Dr. Samenow testified that Atkins is of at least average intelligence. Dr. Samenow based his conclusion on Atkins' vocabulary, knowledge of current events, and other factors from the Wechsler Memory Scale, Wechsler Adult Intelligence Scale and Thematic Apperception Test. For example, Atkins knew that John F. Kennedy was the president in 1961. He also correctly identified the last two presidents, as well as Virginia's current governor. Dr. Samenow further explained that Atkins used "sophisticated words" such as "orchestra," "decimal," and "parable;" that Atkins could recall information Dr. Samenow asked him to remember; and that Atkins could put together a story involving cause and effect.

Dr. Samenow also reviewed Atkins' academic records and noted that, while Atkins had passed the Literacy Passport Test, his academic performance had been terrible and that his school records were "punctuated with statements" by teachers about Atkins' lack of motivation and concentration, his poor study habits, and his ability to do better in school. Finally, Dr. Samenow, like Dr. Nelson, opined that Atkins was able to appreciate the criminality of his conduct and to conform his behavior to the requirements of the law, and that Atkins satisfies most of the criteria for the diagnosis of an antisocial personality disorder.

The Supreme Court of the United States has ruled that imposition of the death penalty on a mentally retarded defendant with the approximate reasoning capacity of a seven-year-old child does not violate the Eighth Amendment prohibition against cruel and unusual

punishment solely because of the defendant's mental retardation. *Penry*, 492 U.S. at 336, 340, 109 S.Ct. 2934. In that case, the Court recognized that the abilities and experiences of mentally retarded individuals vary. Thus, the Court was unwilling to conclude that all mentally retarded people, "by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility[,] inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Id.* at 338, 109 S.Ct. 2934. The Court also refused to rely on the concept of "mental age," noting that it is problematic in several respects and that courts have generally been reluctant to use it as a basis for excusing a defendant from criminal responsibility. *Id.* at 339, 109 S.Ct. 2934. However, the Court did state that a "sentencing body must be allowed to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case." *Id.* at 337-38, 109 S.Ct. 2934.

In Virginia, the mental retardation of a defendant is one of the factors that may be considered in mitigation of capital murder. Code § 19.2-264.4(B). Accordingly, the jury in the present case heard extensive, but conflicting, testimony from Dr. Nelson and Dr. Samenow regarding Atkins' mental retardation. As in any case, it was the responsibility of the jury to assess the credibility of the witnesses and to determine the weight to be afforded to specific evidence. *Yarbrough v. Commonwealth*, 258 Va. 347, 364, 519 S.E.2d 602, 610 (1999). The jury was instructed in the present case to consider any evidence in mitigation of the offense, and the jury obviously found that Atkins' IQ

score did not mitigate his culpability for the murder of Nesbitt. *See Yeatts v. Commonwealth*, 242 Va. 121, 145, 410 S.E.2d 254, 268 (1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992) (jury found defendant's mild mental retardation, based on full scale IQ of 70, did not mitigate capital murder offense, and this Court perceived no reason on appeal to disturb that finding). The question of Atkins' mental retardation is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony on that issue. *Saunders v. Commonwealth*, 242 Va. 107, 115, 406 S.E.2d 39, 43, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991).

In conducting the mandated proportionality review and examining the records accumulated pursuant to Code § 17.1-313(E), we do not find a capital murder case in which testimony indicated that a defendant had a full scale IQ as low as 59.[9] Because Atkins asserts that he cannot be sentenced to death due to his alleged mental

---

[9] In *Mackall v. Commonwealth*, 236 Va. 240, 256, 372 S.E.2d 759, 769 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989), we upheld a sentence of death for a defendant with an IQ of 64 who was convicted of capital murder committed during a robbery. *See also Correll v. Commonwealth*, 232 Va. 454, 467, 352 S.E.2d 352, 359 (1987) (death penalty upheld for defendant who scored 68 on IQ test).

In *Freeman v. Commonwealth*, No. 830920 (Va. Jan. 25, 1984), this Court examined the capital murder conviction of a defendant with a full scale IQ of 61. We denied that defendant's petition for appeal, in which the only assigned error was the failure of the trial court to allow him to withdraw his guilty plea. That defendant argued on brief that his "limited intelligence" and "fear" caused him to plead guilty.

retardation, we must consider, as part of our proportionality review, the same evidence heard by the jury regarding Atkins' mental capacity. In examining that evidence, we find it significant that both Dr. Nelson and Dr. Samenow agreed that a diagnosis of mental retardation involves more than merely determining a person's IQ score; it also requires consideration of an individual's adaptive functioning.[10]

With regard to the issue of adaptive functioning, Dr. Nelson testified that, in determining an individual's ability to function independently, it was necessary to talk with family members, and to review school and employment records. He further stated that he had followed through on that inquiry by reviewing Atkins' academic records and talking to Atkins' parents. As a result of the inquiry, Dr. Nelson reported that Atkins had received poor grades, failed many tests and classes, and was placed in remedial academic courses on a number of occasions. He also stated that Atkins' parents described a number of deficits, but Dr. Nelson never elaborated on the nature of those deficits. In other words, Dr. Nelson never identified an area of significant limitation in

---

[10] According to the DSM-IV, "[t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. . . . " DSM-IV at 39.

Atkins' adaptive functioning other than what he termed Atkins' "academic failure."[11]

In contrast, Dr. Samenow provided the following explanation when asked whether Atkins has any impairment in his adaptive functioning:

> Well, Mr. Atkins never lived independently. In other words, he was not a self-supporting member of society. However, he told me he was able to wash his clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.
>
> This Defendant, . . . as I understand it, lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school either.
>
> So the point is he chose a certain – to live a certain way of life, and there was no lack of ability to adapt and to take care of basic needs, certainly.

Thus, considering "both the crime and the defendant," Code § 17.1-313(C), and the record before us, we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this

---

[11] The dissent acknowledges that a diagnosis of mental retardation requires not only a finding of subaverage intellectual functioning but also limitations in two or more adaptive skill areas. However, the dissent is likewise unable to point to any finding by Dr. Nelson regarding deficits in Atkins' adaptive functioning other than his poor academic performance.

Commonwealth for capital murders comparable to Atkins' murder of Nesbitt. We are not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score. Dr. Nelson and Dr. Samenow agreed that an IQ score is not the sole definitive measure of mental retardation. Both experts also testified that Atkins was able to appreciate the criminality of his conduct and understood that it was wrong to shoot Nesbitt.

Accordingly, we perceive no reason to commute Atkins' sentence of death and will affirm the judgment of the circuit court.

Affirmed.

HASSELL, Justice, with whom Justice KOONTZ joins, concurring in part and dissenting in part.

I.

Code § 17.1-313, which requires that this Court review a sentence of death, states in relevant part that we must consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." I dissent because I believe that the imposition of the sentence of death upon a mentally retarded defendant with an IQ of 59 is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

II.

Dr. Evan S. Nelson qualified as an expert witness on the subjects of clinical and forensic psychology. He testified on behalf of the defendant, Daryl Renard Atkins. Dr. Nelson reviewed the defendant's school records, psychological test data, and certain information related to the defendant's capital murder conviction and his prior convictions. Dr. Nelson also interviewed members of the defendant's family.

Dr. Nelson administered the Wechsler Adult Score, also referred to as the WAIS-III intelligence test, to the defendant. This test was designed to measure the defendant's IQ. Dr. Nelson stated:

> "There are a number of IQ tests on the market. Some of them are for special niches of population. But the WAIS is one of the two that is recognized throughout the United States as a standard for assessing intelligence.
>
> "It's the one that's most frequently cited, for example, in state laws for identifying who qualifies for a learning disability or a mental retardation, the one that's most often cited in Federal disability laws for making determinations involving an IQ or neurologic deficits."

According to Dr. Nelson, there are 13 major subsections of the test that he administered to the defendant. Dr. Nelson administered all 13 of the major subsections to the defendant and determined that the defendant had a full-scale IQ of 59. Dr. Nelson observed:

> "Mental retardation is about two things. Number one, it's about an IQ of around 70 or below, and there [is] some space there, 70 or

> plus or minus five points is the official criteria. . . .
>
> "Secondly, adaptive behavior. Being mentally retarded isn't just a low score on this test. It's about lacking certain abilities to function independently compared to what you'd expect for other persons your age. That's a really important criteri[on]. Because there are some people who can score really well or really poorly on this test but who either do or don't function well in society. So you have to go out and find out by talking with family members and school records and employment records, if they have any, about how they function in the world at large. You need the two of them together to be able to say someone is mentally retarded."

Dr. Nelson, who is a specialist in the assessment of mental illnesses, opined that the defendant was mentally retarded based upon his IQ score of 59 *and* his limited capacity for adaptive behavior. Dr. Nelson pointed out that in addition to the defendant's low IQ score of 59, the defendant's public school academic records "are crystal clear that he has been an academic failure since the very beginning." Dr. Nelson testified that the "lack of variation" in the defendant's performance on the IQ test indicates that the test was properly administered and that the defendant was not "faking" when he took the test.

Even though the defendant was not classified as mentally retarded when he was a student in the Hampton Public Schools Division, his academic performance was very poor. He scored below the 20th percentile in almost every standardized test he took. He failed the second and

tenth grades. He was socially advanced from the fourth grade to the fifth grade.

When the defendant was an eighth-grade student, he received failing grades in all his classes, and he scored in the 15th percentile of standardized achievement tests. When he was a tenth-grade student, he scored in the 6th percentile. The defendant, when a student in high school, was placed in lower-level classes for slow learners and classes with intensive instruction for remedial deficits. His grade point average in high school was 1.26 out of a possible 4.0. The defendant did not graduate from high school.

Dr. Stanton E. Samenow qualified as an expert witness in the subjects of clinical psychology and forensic psychology. He testified on behalf of the Commonwealth. Dr. Samenow interviewed the defendant twice. Dr. Samenow did not administer an IQ test to the defendant. Rather, he asked the defendant some questions.

Dr. Samenow testified that the defendant was able to relate to him certain recent events and historical facts. For example, the defendant knew the name of the Governor of Virginia and knew that former President John F. Kennedy's son had died in an airplane accident. The defendant was also able to associate certain words and to tell a story utilizing certain pictures. Dr. Samenow did not give the defendant a complete intelligence test, but essentially picked and chose certain questions from various tests to query the defendant.

For example, during cross-examination, Dr. Samenow testified:

"As I indicated . . . I gave portions of the Wechsler Memory Scale, the selected items of the Wechsler Adult Intelligence Scale, namely, from similarities, vocabulary and comprehension, and I also gave the Thematic Apperception Test, which in itself is not an intelligence test but it certainly does give some indication of a person's use of syntax, language, vocabulary, and these were portions. I want to underscore, and I said this yesterday, portions of those tests." Dr. Samenow also gave the following testimony:

"Q: In your interviews with the Defendant, did you ascertain any evidence suggestive of mental retardation?

"A: I found absolutely no evidence other than the IQ score that I knew of, because I reviewed a number of materials. No evidence did I find other than that indicating that the Defendant was in the least bit mentally retarded.

"Q: Do you have an expert opinion as to the Defendant's intellect?

"A: He is of average intelligence, at least.

"Q: Explain the basis of how you came to this conclusion.

"A: Largely though several indices. One is the vocabulary and syntax that he used in talking with me. And I have many examples."

Significantly, Dr. Samenow testified that Dr. Nelson's calculations of the scores on the tests administered to the defendant to ascertain the defendant's IQ were correct. Dr. Samenow did not conduct a full evaluation of the defendant, nor did he use questions from the most recent test when he examined the defendant.

III.

> "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: Communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests itself before age 18."

Carroll J. Jones, *An Introduction to the Nature and Needs of Students with Mild Disabilities: Mild Mental Retardation, Behavior Disorders, and Learning Disabilities*, 39 (1996).

Persons with an IQ level in the range of 50 through 55 to 70 are classified as having mild mental retardation. The following table of diagnostic criteria for mental retardation appears in *Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 2598, Benjamin J. Sadock & Virginia A. Sadock eds., (7th ed. 2000):

"Mental Retardation	IQ range	Mental age (years)
Mild	50-69	9 to under 12
Moderate	35-49	6 to under 9
Severe	20-34	3 to under 6
Profound	Below 20	Less than 3"

According to Doctors Kaplan & Sadock:

> "Mild mental retardation (I.Q., 55 to 70) characterizes the largest group of persons with mental retardation, possibly as many as 85 percent of the total. These individuals appear similar to nonretarded individuals and often blend into the general population in the years before and after formal schooling. Many achieve academic skills at the sixth grade level or higher, and some graduate from high school. As adults, many of these individuals hold jobs, marry, and raise families – yet at times they may appear slow or need extra help negotiating life's problems and tasks."

Id. The evidence of record shows that the defendant's full-scale IQ score of 59 falls within the range considered mild mental retardation. Less than one percent of the American population at large has a score of 59 or below.

I would commute the defendant's sentence of death to life imprisonment without the possibility of parole because I believe that the sentence of death is "excessive . . . to the penalty imposed in similar cases, considering both the crime and the defendant." Upon my independent review of the entire record in this case, *see Vinson v. Commonwealth*, 258 Va. 459, 472, 522 S.E.2d 170, 179 (1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 2226, 147 L.Ed.2d 257 (2000), it is clear that this defendant is mentally retarded. This defendant, who has an IQ of 59 and a limited capacity for adaptive behavior, has the cognitive ability or mental age of a child between 9 and 12 years of age. This Court has never approved of the imposition of the death penalty upon a defendant who is mentally retarded *and* has an IQ as low as 59.

I simply place no credence whatsoever in Dr. Samenow's opinion that the defendant possesses at least average intelligence. I would hold that Dr. Samenow's opinion that the defendant possesses average intelligence is incredulous as a matter of law. Indeed, I am perplexed

that Dr. Samenow, who did not administer a complete IQ test to the defendant and admittedly asked the defendant questions based upon bits and pieces of outdated tests to supposedly evaluate the defendant, would opine that this defendant possesses at least average intelligence.

Dr. Samenow admitted that he does not contest the manner in which Dr. Nelson computed the defendant's IQ scores. Additionally, Dr. Samenow admitted that some of the questions he administered to the defendant were based upon a test developed in 1939. Dr. Samenow described this test as "[a]n old standard," yet, he used this obsolete test even though he acknowledged that the *Ethical Principles of Psychologists and Code of Conduct*, Ethical Standards 2.07 (1992) of the American Psychological Association, prohibits the use of obsolete tests and outdated test results and specifically states that "psychologists do not base such decisions or recommendations on tests and measures that are obsolete and not useful for the current purpose."

Moreover, according to the testimony and medical literature, an assessment of mental retardation is predicated upon the subject's IQ score *and* the subject's adaptive behavior. Dr. Samenow, however, could not validly opine about the defendant's adaptive behavior because he had not interviewed anyone who had observed the defendant prior to his incarceration. Additionally, Dr. Samenow's methodology is flawed because when he improperly administered portions of certain tests, he failed to comply with the relevant instructions for those tests.

Also, I place no credence in Dr. Samenow's opinion that the defendant possesses an average intelligence because of the defendant's vocabulary and his ability to relate certain historical facts to Dr. Samenow. It is common knowledge that many children as young as eight years old are capable of relating the same historical facts that the defendant described and possess a vocabulary similar to the defendant's vocabulary.

I recognize that the United States Supreme Court has held that the imposition of the death penalty upon mentally retarded criminal defendants does not violate the Eighth Amendment to the United States Constitution. *See Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). However, the issue in this appeal is not whether the imposition of capital punishment upon a mentally retarded criminal defendant violates the federal Constitution. Rather, the issue in this appeal is whether under Code § 17.1-313 the imposition of the sentence of death is excessive or disproportionate to the penalty imposed in similar crimes, considering both the crime and the defendant. I would answer that question in the affirmative. I believe that the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive, considering both the crime and the defendant.

IV.

I recognize that this defendant has a history of violent criminal behavior. I also recognize that this defendant is clearly a significant danger to society. Therefore, I

would commute this defendant's sentence to life imprisonment without the possibility of parole.

KOONTZ, Justice, with whom Justice HASSELL joins, dissenting.

I agree with the view expressed in detail in Justice Hassell's dissent in this case. For the reasons expressed therein and for the following reasons, I would also commute Daryl Renard Atkins' death sentence to imprisonment for life without the possibility of parole. Code §§ 17.1-313 and 53.1-165.1.

Justice Hassell correctly observes that "[t]his Court has never approved the imposition of the death penalty upon a defendant who is mentally retarded and has an IQ as low as 59." In footnote 9, the majority refers to *Mackall v. Commonwealth*, 236 Va. 240, 372 S.E.2d 759 (1988), to note that this Court has upheld, however, a sentence of death for a defendant with an IQ of 64 who was convicted of capital murder committed during a robbery. In another part of its opinion, the majority further correctly notes that "Dr. Nelson also acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered the [IQ] test." In doing so, apparently the majority suggests that there is no significant distinction between Atkins' full scale IQ and that of Mackall. In my view, our statutory mandate under Code § 17.1-313 to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases" does not, and should not, lend itself to mathematical calculations and comparisons of specific degrees of mental retardation of defendants sentenced to death. Unlike the circumstances

existing when *Mackall* was decided, however, the legislature, with the enactment of Code § 53.1-165.1, has effectively provided that a death sentence commuted to a life sentence shall be a life sentence without the possibility of parole. That change in the law is a valid consideration in the determination of whether a particular death sentence is excessive.

Moreover, it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way. Such must certainly be the case when our system of justice demands, as it does, that even the mentally retarded be held responsible for criminal acts for which the legislature has determined to be properly subject to a death sentence or a sentence of life without the possibility of parole. The choice is clear and limited. In my view, the execution of a mentally retarded individual rather than the imposition of a sentence of life without the possibility of parole is excessive. I would not permit such a result in Atkins' case even though his crime was vile and his guilt undeniable. For these reasons, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

October 1, 2001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
478-3011

Mr. Robert E. Lee
Suite 301
2421 Ivy Road
Charlottesville, VA 22901

RE: Daryl R. Atkins v. Virginia
No. 00-8452

Dear Mr. Lee:

The Court today entered the following order in the above-entitled case:

The order entered September 25, 2001 is amended as follows: "The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment."

Very truly yours,

WILLIAM K. SUTER, Clerk

By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

cc: Pamela A. Rumpz
Clerk, Supreme Court of Virginia
(Your No. 000395)